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No. 04-

IN THE

Supreme Court of the United States

Abdela Tum, et al.,

Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is time employees must spend *walking* to and from stations where required safety equipment is distributed compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act? 29 U.S.C. 216(b), 254(a). (This is the first question presented by No. 03-1238, *IBP, Inc.* v. *Alvarez*.)

2. Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations, and for time spent donning and doffing equipment that is necessitated by the employees' working conditions but not expressly required by the employer or by law?

3. Is this walking and waiting time rendered non-compensable merely because the associated compensable donning or doffing time is *de minimis* in isolation, even if the aggregate waiting, walking, donning, and doffing period is not *de minimis*?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Nicholas Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Heidi Wallace, and Mintwab Yimam.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Abdela Tum, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-19a) is reported at 360 F.3d 184. The report and recommendation of the magistrate judge recommending partial summary judgment (Pet. App. 20a-48a), dated January 23, 2002, is unpublished. The district court's order adopting this report and recommendation (Pet. App. 49a-50a) is unpublished.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on March 10, 2004. Justice Souter granted an extension of time for the filing of this petition on May 28, 2004. This court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The relevant provision of the Fair Labor Standards Act, 29 U.S.C. 254(a), is reproduced at Pet. App. 51a.

STATEMENT OF THE CASE

This case presents issues closely related to those raised by No. 03-1238, *IBP, Inc.* v. *Alvarez et al.*, in which this Court has called for the views of the Solicitor General, 122 S. Ct. 2114 (May 3, 2004). The petitions for certiorari in this case and *Alvarez* should be granted, and the cases consolidated. Although the cases present some common questions, each also presents distinct and important issues on which the circuits are divided. By granting plenary review in both cases, the Court will provide needed guidance regarding the compensability of time associated with employees' donning and doffing of required safety equipment.

1. The petition for certiorari in *Alvarez* presents two questions. First, when time spent donning and doffing safety equipment is compensable work under the Fair Labor Standards Act (FLSA), 29 U.S.C. 216(b), is the time that employees spend *walking* to and from the stations where they are required to pick up that equipment also compensable? See *Alvarez* Pet. at i. Second, is the otherwise compensable time spent donning and doffing such equipment "clothes-changing time" within the meaning of FLSA Section 3(o), 29 U.S.C. 203(o), such that it can be deemed non-compensable according to the terms of a collective bargaining agreement? The second of these questions incorporates an issue of administrative law: the degree of deference owed to a Department of Labor opinion letter. See *Alvarez* Pet. at i.

This case presents, *inter alia*, the first of the two *Alvarez* questions. Indeed, the First Circuit's holding in this case created the circuit split with the Ninth Circuit's decision in *Alvarez*. See *Alvarez* Pet. at 12. This petition also raises three related issues meriting review that the *Alvarez* petitioner has not raised. First, is time spent *waiting* at (as opposed to *walking* to or from) equipment distribution stations compensable? Second, is donning and doffing time compensable even if the equipment is not formally required by the employer, but is necessitated by the nature of the job? Third, is walking and waiting time rendered non-compensable merely because the time spent donning and doffing the equipment is *de minimis* when taken in isolation, even if the aggregate donning, doffing, walking, or waiting time is more than *de minimis*?

2. The Fair Labor Standards Act (FLSA), 29 U.S.C. 216(b), requires employers to pay minimum and overtime wages for all hours statutorily defined as compensable work time. The Portal-to-Portal Act, 61 Stat. 86, which amended the FLSA, deemed non-compensable certain time spent on travel within workplace grounds as well as other activities that are "preliminary or postliminary" to the "principal activity or activities." 29 U.S.C. 254(a). Interpreting this Act, this Court has held that any pre- or post-shift activity that is an

"integral and indispensable part" of the principal work activity is compensable work, and that donning and doffing certain protective gear satisfies this criterion. *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956). However, employers are not required to pay employees for otherwise "compensable" work time that is *de minimis* in length. See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

3. Petitioners are hourly wage employees at respondent's poultry processing plant in Portland, Maine. Petitioners' work exposes them to hazardous machinery and tools, extreme cold related to poultry freezing operations, and toxic and caustic chemicals. Pursuant to USDA and plant rules, all employees of the plant are required to wear lab coats, hair nets, earplugs, and safety glasses on the production floor; depending on their job category, they may also be required to wear vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, steel-toed boots, rain pants, steel mesh gloves, palletizing gloves, tool clips, set-up tools, hose nozzles, and lockout-tagout equipment. Some of these materials are distributed to employees at the plant's supply cage, others on racks or in bins down the hall from the supply cage, and others in tubs alongside the production floor.

Employees must wait in line at the supply cage for up to ten minutes to receive equipment, and then experience further delays at the racks and bins. They must also retrieve certain equipment from a locker room, creating additional delays. Because the hallways are very crowded at the beginning and end of each shift, navigating between the locations can be a slow process. All told, because employees are expected to be dressed and equipped for work when their shifts begin, they typically arrive between fifteen and thirty minutes early in order to accomplish these tasks; many employees have been ordered by their supervisors to do so. Doffing and depositing equipment in lockers, laundry bins, and trash cans at the end of the day takes substantial additional time and involves similarly slow navigation of the halls between multiple locations.

4. Petitioners filed this collective action suit under the FLSA, 29 U.S.C. 201 *et seq.* They allege that respondent unlawfully failed to compensate them for the time that they were required to spend obtaining, donning, doffing, and returning required protective clothing and equipment.

The district court granted respondent's motion for partial summary judgment on several grounds. It held that walking and waiting time, as well as time spent donning and doffing protective equipment not formally required by the employer or by law, was not compensable work time under the FLSA and the Portal-to-Portal Act. Pet. App. 33a-34a, 37a. The district court held that the time spent donning and doffing required equipment was compensable, however, and the case proceeded to trial. *Id.* 36a-37a. After the walking and waiting time and the donning and doffing of non-required equipment were excluded from the calculation, the jury found that the remaining amount of "donning and doffing" time, *standing alone*, was *de minimis*, and that petitioners were thus not entitled to compensation. Petitioners appealed.

The court of appeals affirmed. 331 F.3d 1. It subsequently vacated that judgment and granted petitioners' and the Secretary of Labor's request for panel rehearing, but rejected the Secretary's position and again affirmed the district court. Pet. App. 2a.

In holding that walking time was non-compensable under the Portal-to-Portal Act, the court of appeals rejected the Labor Department's view that, because the Act does not apply to activities performed during the workday, it cannot bar compensation for walking and waiting time that occurs after the first compensable activity – *e.g.*, the donning of protective gear – has triggered the beginning of the workday. Pet. App. 9a-10a. The court also interpreted the Labor Department regulation defining "principal activity," 29 C.F.R. 790.8, to exclude time spent waiting for required equipment even though, as the court conceded, the regulation does not expressly address the categorization of this waiting time and

even though – as the court failed even to mention – this interpretation flatly contradicted the Labor Department's reading of its own regulation. Pet. App. 12a. And the court found that the time spent donning and doffing the safety equipment that was not formally required was non-compensable. *Id.* 8a.

In a concurring opinion, Chief Judge Boudin acknowledged that the court's holding conflicted with that of the Ninth Circuit in *Alvarez*, and that "[n]either outcome is impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy." Pet. App. 17a, 18a-19a. He also acknowledged that the Secretary of Labor's interpretation supporting petitioners was entitled to "some deference," but nonetheless rejected that interpretation. *Id.* 19a. He concluded by expressly inviting this Court's review:

> [T]he question is how far *Steiner* has qualified the statute. Perhaps it is enough for a lower court that the Secretary's position is, in practical effect, a substantial step beyond *Steiner*. As *Steiner* itself tempers the Portal-to-Portal Act's main thrust, probably its extension should be left to the Supreme Court. * * * It may be time for the Supreme Court to have another look at the problem.

Id. 19a.

5. This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions That Have Divided The Circuits And Merit This Court's Review.

This petition presents important, interrelated questions concerning the compensation of hourly wage workers for substantial periods of time spent performing tasks either expressly required of them by their employers or necessary to the safe performance of their jobs: walking to and waiting at safety equipment distribution stations, and donning and doffing the equipment distributed there. This Court held in

Steiner that time spent donning and doffing such equipment is "compensable" under the FLSA, but several crucial related questions remain unresolved and have divided the lower courts. This Court's intervention is thus warranted.

1. The first question is whether *walking* time associated with the donning and doffing of required safety equipment – including time spent walking to equipment distribution stations, from those stations to the changing room, and from the changing room to the work floor at the start of a shift, and the reverse of each of these steps at the end of the shift – is "compensable work time," *Steiner*, 350 U.S. at 249, under the FLSA. The court of appeals in this case held that this walking time was not compensable under the Portal-to-Portal Act, which amended the FLSA, because it was merely "preliminary or postliminary," 29 U.S.C. 254(a)(2), to the principal activity that the workers are hired to perform. Pet. App. 8a-10a. This holding squarely conflicts with that of the Ninth Circuit in *Alvarez*. See *Alvarez*, 339 F.3d at 906-07.

2. The second question is whether *waiting* time – *viz.*, the time employees spend waiting at the equipment distribution stations for the items they must wear – is compensable. This Court addressed the compensability of waiting time in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-37 (1944), holding that "no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time," and that whether a particular waiting period is compensable depends on whether the employee is "engaged to wait" (*i.e.*, not free to engage in his own pursuits, but required to wait by the employer) or "wait[ing] to be engaged." *Id.* The First Circuit in this case held, however, that the Portal-to-Portal Act had obviated this distinction:

> Even if we were to find that the employees were engaged to wait under the FLSA and its accompanying regulations, the waiting time would qualify as preliminary or postliminary activity under the Portal-to-Portal Act. "Wait time is compensable when it is part of a principal

> activity, but not if it is preliminary or postliminary activity."

Pet. App. 11a (quoting *Vega* v. *Gasper*, 36 F.3d 417, 425 (CA5 1994)). Citing Labor Department regulations, but inexplicably ignoring the Department's own interpretation of those regulations, the court proceeded to deem the "time spent waiting in line for gear" to be "preliminary" and therefore not compensable under the Portal-to-Portal Act. *Ibid.*

The court of appeals' holding in this case directly conflicts with the Ninth Circuit's decision in *Alvarez*. See *Alvarez*, 339 F.3d at 904 (holding that "'donning and doffing' and 'waiting and walking' constitute compensable work activities); *id.* at 903 (describing how defendant IBP required employees to "wait for and to retrieve that gear in particular areas at particular times"). In addition, the First Circuit's holding regarding waiting time conflicts with other circuits' holdings that time during which an employees are required to wait and are not free to engage in their own pursuits is compensable. See, *e.g.*, *Mireles* v. *Frio Foods*, 899 F.2d 1407, 1411 (CA5 1990); *Cole* v. *Farm Fresh Poultry*, 824 F.2d 923, 929 & n.6 (CA11 1987); see also *Brock* v. *DeWitt*, 633 F. Supp. 892, 895 (W.D. Mo. 1986).[1]

3. The third, closely related question involves the application of the "*de minimis* rule" established by this Court in

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[1] The Tenth Circuit also weighed in on these issues in *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (CA10 1994), reaching a mixed result. Although finding compensable time spent waiting for the distribution of knives, *id.* at 1125, the court held that "walking and waiting" associated with "donning and doffing" was not compensable on the facts of the case. *Id.* at 1127. The court observed that employees often did not move continuously from the activities associated with donning and doffing to their principal work activities, but instead took extended breaks, and that these "differences in personal routines" meant that "workers should be paid on the basis of a reasonable time to conduct these activities, not to include 'wait and walk time.'" *Ibid.*

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The Court there stated:

> The workweek contemplated by § 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

Id. at 692. Thus, although whether a particular activity is "compensable" under the FLSA is a legal question, whether the amount of time spent on compensable activity is *de minimis* is a question for the trier of fact.

In this case, the district court granted summary judgment in favor of the defendant as to the compensability of all activities other than the time spent actually donning and doffing required equipment. A jury then determined that the amounts of time spent on donning and on doffing, when each was taken in isolation, were *de minimis*.

This case thus presents the question whether the court should defer to the Department of Labor's conclusion that an activity that is "compensable work" within the meaning of the FLSA may signal the start or stop of the work day even if it, taken alone, occupies a *de minimis* quantity of time. Petitioners' donning and doffing of required safety equipment undisputedly met the criteria for compensable work; that conclusion follows directly from *Steiner*, as the district court and court of appeals recognized. As the Secretary argued below, walking and waiting time that falls between those com-

pensable acts is part of the "workday" and is therefore not subject to the limitations of the Portal-to-Portal Act. This conclusion, the Secretary emphasized, is not altered by the jury's finding that the donning and doffing periods were themselves *de minimis*, because the *de minimis* rule, which exists purely to avoid the administrative inconvenience of clocking tiny, separate increments of time, has nothing to do with the determination of whether an activity is compensable as a matter of law and thus marks the beginning or end of a workday.

In resolving this question, this Court should also provide guidance to the courts of appeals as to how the period of time that is the subject of the *de minimis* inquiry should be defined, a subject that has divided the lower courts. The Secretary of Labor observed below that most courts have applied the *de minimis* standard to the *aggregate* amount of compensable work time for which employees have not yet been compensated, with the aggregation done over a period of *at least* one work day; indeed, some courts have aggregated the entire amount of time at issue in a given *claim*. See, *e.g.*, *Lindow* v. *United States*, 738 F.2d 1057, 1063 (CA9 1984) (aggregating at least on a daily basis, and applying a three-factor test, considering the amount of time spent daily, the amount of total time involved in each employee's claim, and the administrative burden imposed by requiring compensation); *Brock* v. *City of Cincinnati*, 236 F.3d 793, 804 (CA6 2001) (same, following *Lindow*); *Kosakow* v. *New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 719 (CA2 2001) (same, following *Lindow*); *Reich* v. *Monfort, Inc.*, 144 F.3d 1329, 1333-34 (CA10 1998) (same, following *Lindow*); *Nardone* v. *Gen. Motors, Inc.*, 207 F. Supp. 336, 340 (D.N.J. 1962) (aggregating in terms of "minutes per day"). In *Alvarez*, oddly, the Ninth Circuit did not apply the *Lindow* test but instead deemed a single category of activity – the donning and doffing of "non-unique" equipment such as hard hats – to be "*de minimis* as a matter of law." 339 F.3d at 903. This approach plainly conflicted with that of numerous other circuits.

This issue is presented by this case for two reasons. First, it is inextricably bound up with the question whether the *de minimis* inquiry is part of the definition of the "workday." As the Secretary argued, it would be impossible to aggregate the amount of time spent per workday if the "workday" itself were not first defined; assuming the majority approach is correct, the *de minimis* inquiry cannot itself be an aspect of defining the workday, or else the definition would be hopelessly circular. See *infra* Part III.A. Second, the aggregation issue will be presented on remand, making this Court's guidance essential. In this case, the jury's *de minimis* determination was based solely on the amount of time spent actually donning the required equipment and, separately, the time spent doffing it. If this Court holds that the associated walking and/or waiting time is also compensable, the question will then be presented whether the new *de minimis* calculation must be based on the aggregate amount of time spent on waiting, walking, donning, and doffing time, or on each activity separately. Thus, this case presents the opportunity for this Court to resolve the important circuit split regarding the application of the *de minimis* rule.

4. The final question presented here is whether the court of appeals erred in holding that the donning and doffing of safety gear not formally required by the employer or by law, but required by the necessities of the job, was *not* compensable. That gear includes cold-weather jackets and glove liners that enable employees to withstand the extreme cold to which they are exposed, as well as aprons and sleeve covers used for sanitation and back belts used to protect the employees from injuries. As discussed further in the next Part, the court of appeals' holding that this donning and doffing was non-compensable – which turned solely on the lack of a formal job or regulatory requirement – flatly contradicts *Steiner*, in which the donning and doffing of similarly non-required equipment was held compensable. And it even more plainly conflicts with the Sixth Circuit's decision in *Steiner*, which this Court affirmed, and which expressly considered and re-

jected the very required/non-required distinction the court of appeals relied on here. See *Steiner* v. *Mitchell*, 215 F.2d 171, 174-75 (CA6 1954).

Certiorari is warranted not only because of the circuit conflicts these issues present, but also because these questions directly and substantially affect the compensation of hundreds of thousands, and perhaps millions, of hourly wage workers in high-risk industrial jobs who are required to wear safety gear or other special equipment when they work. For example, the meat industry alone employs over 350,000 workers in production positions, most as slaughterers, meat packers, or meat cutters. See Bureau of Labor Statistics, 2001 National Industry-Specific Occupational Employment and Wage Estimates, SIC 201 – Meat Products, *available at* http://www.bls.gov/oes/2001/oesi3_201.htm. And the amount of time involved is substantial enough to make a serious difference to these low-wage workers' pay. When donning and doffing are taken together with the associated walking and waiting, petitioners here alleged that they spent, depending on their job category, between twenty and thirty-seven minutes on these activities per day.

The courts of appeals' conflicting interpretations of the FLSA, the Portal-to-Portal Act, and the associated Department of Labor regulations thus leave innumerable low-wage employees in a state of considerable uncertainty as to the compensation to which they are entitled; they also place companies in the untenable position of facing different federal compensation requirements in different parts of the country. This Court has on numerous occasions determined that very similar issues merit its resolution. See *Barrantine* v. *Ark. Best Freight Sys.*, 450 U.S. 728 (1981); *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 263 (1956); *Steiner*, 350 U.S. at 256; *Anderson*, 328 U.S. at 692; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *Skidmore* v. *Swift*, 323 U.S. 134, 136-37 (1944). It should do so again here.

II. This Case And *IBP* v. *Alvarez* Present Overlapping But Distinct Issues, And Both Merit This Court's Review.

Rather than merely granting certiorari in *Alvarez*, the Court should also grant this petition and consolidate the two cases. Both present the first question raised by the *Alvarez* petition – whether walking time is compensable – and *Alvarez* is properly regarded as the vehicle to decide that issue. For the reasons described in the *Alvarez* petition, that question merits review in this Court. The conflict frequently recurs in the courts; involves sums that are financially significant for employees and, in the aggregate, for employers; and results in disparate pay policies for employees at different plants within the same company. See *Alvarez* Pet. at 11-14 (describing circuit conflict); *id.* at 15-17 (explaining its importance).

Of note, however, granting certiorari only in *Alvarez* would raise the distinct prospect that the important walking time issue would be left unresolved. A ruling in favor of the employer in *Alvarez* on the second question presented by that petition – whether time related to changing safety equipment may be rendered non-compensable pursuant to a collective bargaining agreement under FLSA Section 3(o) – would dispose of that case. Granting certiorari in both cases will ensure that this Court is able to resolve the walking time question

Certiorari is also warranted in this case because this petition presents further questions relating to the compensability of equipment-changing time on which the lower courts require guidance. The *Alvarez* petitioner, for example, does not seek this Court's review of the important split between the First and Ninth Circuits over whether time spent *waiting* for equipment is compensable. Nor does *Alvarez* present the important issue whether time spent donning and doffing non-required equipment by the employer is compensable.

A ruling in this case (unlike *Alvarez*) would also resolve the uncertainty that surrounds the FLSA's application to work environments where the time necessary to don and doff safety

equipment is *de minimis*, but the associated waiting and walking time is significant. That too is a frequently recurring scenario in beef and poultry operations, as some equipment may be put on or taken off with relative ease and speed but (as in this case) may be dispersed among several different stations in the plant. In addition, each station may have significant waiting lines because of the bottleneck created as each employee passes through. This case illustrates that the actual donning and doffing time held compensable in *Steiner* is often comparatively minimal – but *only if* the time spent walking to and waiting at distribution stations is excluded.

A decision by this Court in the *Alvarez* case alone addressing merely the compensability of walking time would leave unresolved the proper disposition of this important class of cases and would additionally leave unsettled the proper period of time over which courts should aggregate in order to perform the *de minimis* inquiry – an issue that has divided the circuits and that, although decided by the Ninth Circuit in *Alvarez*, is not presented to this Court in that case because the respondents there did not cross-petition. By contrast, this case is an excellent vehicle for this Court to review the Secretary's interpretation, because the jury's *de minimis* finding makes its application outcome-determinative as to the compensability of the walking and waiting time that occurred after the donning and before the doffing of required safety equipment.

Finally, we note that the procedural posture of *Alvarez* is unusual in that the respondent-plaintiffs will receive the same monetary judgment no matter whether they prevail in this Court. See *Alvarez* BIO at 9-11. Although we do not believe that this fact renders the questions presented moot, some members of the Court may disagree or may conclude that the case's posture will affect the course of that case's litigation here. Granting certiorari in both *Alvarez* and this case would obviate those concerns.

III. The Court Of Appeals Erred In Deeming The Walking And Waiting Time In This Case Non-Compensable.

For three reasons, the court of appeals erred in holding that the walking and waiting time associated with donning and doffing safety equipment was not compensable. First, the time between the first and last compensable activities of the day (whether or not those activities occupy more than a *de minimis* period) is part of the "workday" and thus not subject to the limitations of the Portal-to-Portal Act. Second, walking and waiting time is in any event compensable because it, like the time spent donning and doffing required equipment, is integral and indispensable to the employees' principal job activities. Third, as to both contentions, the court should have deferred to the views of the Secretary of Labor persuasively interpreting the FLSA and Portal-to-Portal Act and authoritatively interpreting her agency's own regulations.

A. The "Workday" Runs Continuously Between The First And Last Compensable Activities Of The Day, Such That All Activities In Between Are Compensable.

As the Secretary of Labor explained in her *amicus* brief below, the "bedrock principle" underlying the definition of compensable time under the FLSA, as amended by the Portal-to-Portal Act, is that employees will be paid for all activities that take place during the "workday." See Sec. of Labor *Amicus* Brief Supporting Pet. for Reh'g at 6 (hereinafter Labor Br. I) (citing 29 U.S.C. 254(a)). With the exception of bona fide meal periods and break periods that are "long enough to enable [the employee] to use the time effectively for his own purposes," 29 C.F.R. 785.16(a), the "workday" is a continuous period; it does not start and stop repeatedly as the employee moves from one activity to the next. The Portal-to-Portal Act thus defines as non-compensable only those hours "prior to the time on any particular workday at which such employee commences, or subsequent to the time on any

particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a).

As the Secretary explained, the "plain language of the Portal Act and the import of the Secretary's interpretive regulations when read in their entirety require that the first and last principal activities performed by an employee mark the beginning and end of his 'workday,' and all time spent between the performance of those activities, including walking and waiting time, is compensable." Labor Br. I, *supra*, at 5-6. There is no dispute that petitioners' donning and doffing of required safety equipment is such a "principal activity," because it is "integral and indispensable" to the employees' work: that was the holding of *Steiner*, 350 U.S. at 252-53, which the court of appeals correctly followed here, Pet. App. 7a. Thus, at a minimum, petitioners' workday runs continuously from the time they don the first piece of required equipment until the time they doff the last such item, except for bona fide lunch periods and other substantial breaks. It thus encompasses any walking and waiting time that occurs during that period, and the First Circuit's contrary ruling is erroneous.[2]

This "continuous workday" rule is supported by, in addition to the statute's plain language, its legislative history and the case law interpreting it. According to the Senate Report on the Portal-to-Portal Act, "Any activity occurring during a workday will continue to be compensable in accordance with the existing provisions" of the FLSA; the Portal-to-Portal Act "relieves an employer from liability" only for payment for activities that "take place outside of the hours of the employee's workday." S. REP. NO. 80-48, at 48, 46-47 (1947). See also 29 C.F.R. 790.6.

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[2] Indeed, the workday actually starts earlier, beginning when the employees commence waiting in line at the first equipment distribution station; as discussed in the following section, such waiting time is itself compensable as a "principal activity."

With the exception of the court of appeals in this case, the lower courts have faithfully applied the "workday" concept. See, *e.g.*, *Alvarez*, 339 F.3d at 907 ("There is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done."); *United Transp. Union Local 1745* v. *City of Albuquerque*, 178 F.3d 1109, 1119 (CA10 1999); *Mireles*, 899 F.2d at 1414; *Crenshaw* v. *Quarles Drilling Corp.*, 798 F.2d 1345, 1351 (CA10 1986); *Dooley* v. *Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 243 (D. Mass. 2004); *Reich* v. *IBP, Inc.*, 820 F. Supp. 1315, 1325 (D. Kan. 1993), aff'd, 38 F.3d 1123 (CA10 1994); *Dole* v. *Enduro Plumbing, Inc.*, 30 Wage & Hour Cas. (BNA) 196, 200 (C.D. Cal. Oct. 16, 1990).

The continuous workday rule is also supported by the Department of Labor's regulations. The principal regulation setting forth the workday principle is 29 C.F.R. 790.6(a), which states in relevant part:

> Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they "occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases" the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular

> workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.

Id. (citing legislative history). See also *id.* § 790.6(b); *id.* § 785.9;.*id.* 785.38.[3]

The application of the continuous workday rule is not affected by the determination that the activities that mark the beginning and end of the workday are, taken alone, *de minimis* in length. As the Secretary has explained, "the concept of de minimis is not relevant in determining the beginning and end of the 'workday.'" Secretary of Labor Supp. Br. in Supp't of Reh'g at 2 (hereinafter Labor Br. II). The *de minimis* rule has an altogether different provenance from the statutory definition of compensable working time; this Court created the rule in the *Mt. Clemens* case, 328 U.S. at 692, as essentially a prudential limitation on the FLSA's compensation requirements; the "realities of the industrial world" make it impractical for employers to keep track of "[s]plit-second absurdities." *Ibid.*

In other words, in order to determine whether employees must be paid for certain pre- and post-shift activities, courts (and juries) must engage in a two-step inquiry. First, is the activity in question compensable "work" under the FLSA and Portal-to-Portal Act? Second, if so, is the period of time the activity occupies more than *de minimis*?

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[3] Under the law in place prior to the Portal-to-Portal Act's passage, all of the walking and waiting time at issue in this case would indisputably be compensable work. See *Mt. Clemens*, 328 U.S. at 690-91 (holding that employees were entitled to compensation for the time spent walking from plant entrance to their work stations).

As discussed above, the courts have generally approached the *de minimis* determination by aggregating the amount of time spent on compensable but uncompensated activities each day, or even aggregating the total amount involved in the claim, then determining whether these activities, taken together, are *de minimis*. See, *e.g.*, *Lindow*, 738 F.2d at 1063. As the Secretary explained below, this approach cannot be reconciled with the view that the "workday" must itself be defined to exclude activities deemed "*de minimis*":

> [A]ggregation of uncompensated time, for purposes of a de minimis determination, can only take place after the "workday" is established. Discrete activities such as, for example, the donning of goggles, cannot be looked at in isolation and declared to be in and of themselves de minimis or not, and on that basis be determinative of whether the "workday" begins. Rather, there must be a determination of the "workday" based on the employee's first and last principal activities (or those activities that are integral to the performance of the employee's principal activities). Only then, after the "workday" is fixed, can a determination be made whether all the otherwise compensable time within the workday, for which employees were not compensated, should be compensated * * *.

Labor Br. II, *supra*, at 5-6.

B. All Of The Time At Issue In This Case Is Compensable Under The Portal-To-Portal Act Because It Is Integral And Indispensable To Petitioners' Principal Job Activity.

1. As noted in the previous section, the only possible basis for excluding any of the time in question from the definition of compensable work is the limitation found in the Portal-to-Portal Act, which was passed in response to this Court's holding in *Mt. Clemens*, 328 U.S. 680, that employees were entitled to compensation for travel from a plant's entrance to their individual work stations. The Act provides that no employer shall be required by FLSA to pay for

> (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a). The import of the Portal-to-Portal Act for this case is that it deems non-compensable petitioners' initial walking time from the plant entrance to the place at which they commence the process of acquiring and donning safety equipment – that is, depending on the order in which the employees proceed, the time spent walking to the first equipment distribution station or to their lockers – as well as the return trip out to the plant entrance from the lockers or disposal bins at the end of the day. The Act does *not* deem non-compensable the time spent waiting at the distribution stations, nor the time spent walking between the stations, the lockers, and the production floor.

The central issue in the application of the Portal-to-Portal Act is whether the activities in question are merely "preliminary to or postliminary to" employees' principal job duties, or whether they are, alternatively, part of those duties (or, as discussed above, part of the workday). This Court established the line between these two categories in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), holding that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Id.* at 256. The Court held that, under this standard, the donning and doffing of gear that was necessary for employee safety, as well as time spent shower-

ing as required by the employer, was "clearly an integral and indispensable part of the principal activity." *Ibid.*

2. Applying the *Steiner* standard, the court of appeals in this case affirmed the district court's holding that the time petitioners spent donning and doffing required safety equipment was part of the principal activity. In light of that holding, the conclusion that the contested walking and waiting time was also compensable should have been clear. Petitioners obviously could not put on equipment that they did not possess. Because respondent required them to obtain new or laundered gear each day from the distribution stations, the *only way* petitioners could engage in the principal work activity of donning and doffing gear was to walk to and wait at those stations. Acquiring the gear, a process consisting of walking and waiting, was straightforwardly "integral and indispensable" to the process of putting it on. Similarly, petitioners were required, upon doffing the equipment, to drop it in laundry bins so that it could, for essential reasons of safety and hygiene, be cleaned for the next day. Walking associated with doffing equipment is thus also compensable.

The Ninth Circuit in *Alvarez* properly recognized as much. Applying the standard generally applied by the courts of appeals, that to be "'integral and indispensable,' an activity must be necessary to the principal work performed and done for the benefit of the employer," 339 F.3d at 902-03, the court treated the walking and waiting time (the "retrieving" of equipment) as part of the same activity as the donning and doffing itself. *Alvarez*, 339 F.3d at 903 (emphases added and citations deleted) (citing regulations discussed below).

The First Circuit's contrary holding in this case that "[o]n their face," the provisions of the Portal-to-Portal Act "would appear to exempt from compensation the walking at issue here" is baffling. The Act refers only to walking to the place at which the primary activity is performed, and the First Circuit itself held that donning and doffing is part of the primary activity. See Pet. App. 7a. The walking time at issue in this

case is plainly *not* excluded by § 254(a)(1), and the question whether it is encompassed by the somewhat broader exclusion of § 254(a)(2), applying to preliminary and postliminary activity, can be resolved only by reference to the *Steiner* "integral and indispensable" test, a test that the court of appeals never even applied to walking time.

3. In holding that waiting and walking time were not compensable, the court of appeals in this case inexplicably relied on two Department of Labor regulations, even though the Secretary of Labor has authoritatively interpreted those regulations and others to support just the opposite conclusion. First, quoting footnote 49 of 29 C.F.R. 790.7(g), the court noted that "just because the changing of clothes may in 'certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity[,]" this does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) [Portal-to-Portal Act] refers.'" Pet. App. 8a-9a. Similarly, the court also cited 29 C.F.R. 790.8(c) with respect to the waiting time issue, stating that

> while the Code [of Federal Regulations] does not explicitly address the type of waiting time at issue, the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary. By making compensable some activities that are not traditionally thought of as primary activities, such as a logger carrying heavy equipment out to the logging site and a butcher sharpening knives, the Code was compensating workers for activities that are so integral to a principal activity that they cannot be separated from that activity. However, by excluding walking with ordinary equipment and carrying light equipment, the Code indicates that a line must be drawn, otherwise an almost endless number of

> activities that precipitate the employees' essential tasks would be compensable.

Pet. App. 12a.

In her briefs below, the Secretary squarely rejected the court's extrapolations from both of these provisions. She noted that these regulations merely identify particular activities that "*normally* or *ordinarily* would not be considered principal activities," but explained that the regulations would not exclude the activities under the recurring factual circumstances typified by this case. First, the Secretary noted that the provisions in no way conflicted with the agency's interpretation of the "workday" concept; they simply spoke to which activities could be designated the first and last "primary" activities of the day, and did not preclude compensation for anything that came in between. Labor Br. I., *supra*, at 10 ("By culling from the Secretary's interpretive regulations isolated language, the panel failed to recognize the overriding dictate of the regulations – that the reach of the Portal Act is limited by the 'workday' principle."). Second, the Secretary noted that the "ordinary equipment" mentioned as an example in § 790.8(c) was, unlike the equipment at issue here, located at employees' homes; petitioners have never contended that putting on clothing or equipment at home is compensable. Labor Br. I, *supra*, at 12 n.7. Third, the Secretary emphasized that 29 C.F.R. 790(8)(a) provides that the phrase "principal activities" is to be "construed liberally," to encompass, for example, clothes-changing necessary to the job, as well as "any work of consequence performed for the employer." Labor Br. I, *supra*, at 12-13 n.8.

4. Finally, the court of appeals erred in holding that the time spent donning and doffing clothing and safety equipment that was not formally required by respondent was non-compensable. The court of appeals offered little analysis of this question, again making no effort to apply the *Steiner* "integral and indispensable" standard. It simply stated, "Not everything an employee does in her workplace is com-

pensable under the FLSA. These optional items are required neither by the employer nor by the regulations and are worn by Employees at their own discretion." Pet. App. 8a. This holding is irreconcilable with *Steiner* itself, which held that the time spent donning and doffing *non-required* safety equipment was compensable.

The Sixth Circuit in *Steiner* thus considered and squarely rejected the exact argument that the First Circuit in this case embraced:

> Although it has been stipulated that the defendants have never issued any order nor made any formal requirement that their plant employees use the clothes-changing and showering facilities provided by the defendants, the defendants' insurance carrier would not accept the insurance risk if defendants refused to provide showering and clothes-changing facilities for their employees. Such facilities, having been furnished, were intended to be used. From time to time defendants' plant superintendent * * * instructed the employees to change clothes and shower * * * . The furnishing, by defendants, of clothes-changing and showering facilities, and the use of such facilities by defendants' employees, have the effect of reducing and controlling the defendants' potential legal liabilities, enable the defendants to comply with the direct requirements of state law and the indirect requirements of their insurer, and contribute to the continued and uninterrupted operation of the defendants' business by promoting the health of defendants' employees.

215 F.2d at 174-75 (quoting and affirming district court findings). This Court in turn affirmed. *Steiner* thus stands for the proposition that time spent donning and doffing safety equipment is compensable if it is integral and indispensable to the employees' jobs, a determination that does not turn on whether it is a formal job requirement.

C. The Court Of Appeals Erred In Refusing To Defer To The Secretary Of Labor's Interpretive Regulations And Her Interpretations Of Those Regulations.

The court of appeals essentially ignored the well-reasoned, thoroughly explained views of the Secretary of Labor, most of which are embodied in interpretive regulations that have been in place for six decades.

1. This Court held in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), that the views of the Administrator then responsible for the FLSA were entitled to deference regarding what portions of employee waiting time were to be considered compensable work. The Court held that the Administrator's views, embodied only in an *amicus* brief, informal rulings, and an interpretive bulletin, constituted

> a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Ibid. In this case, the views of the Secretary of Labor regarding the interpretation of the exact same law with regard to a virtually identical issue plainly are entitled to *at least* the same level of deference that the Court held was due in *Skidmore*.

For several reasons, the application of the *Skidmore* standard should produce an even greater degree of deference to the Secretary's views today, even assuming that the form in which they are today embodied – interpretive regulations – do not trigger the greater deference provided under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See generally *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). First, the core regulations at issue here, setting forth the continuous workday principle, have been in place since 1947, not long after the Portal-to-Portal

Act was passed. See 29 C.F.R. 790.6. This Court has repeatedly recognized that a level of deference at the highest end of the *Skidmore* scale is due to agency interpretations of long standing, see, *e.g.*, *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1001 (2004) (deferring to an EPA view expressed in several publications beginning in 1983), and Section 790.6 is perhaps one of the longest-standing interpretive regulations issued by any agency. Second, the interpretation is contemporaneous with the statute's passage. See, *e.g.*, *Aluminum Co. of Am.* v. *Cent. Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984). Third, the regulations are exceptionally detailed and thorough in their analysis, and were based on the Administrator's careful expert analysis. See 29 C.F.R. 790.1 n.5 ("The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two Acts.

Moreover, these regulations are more formal in form than the bulletins and *amicus* briefs at issue in *Skidmore* itself, and may in fact be entitled to *Chevron* deference. This Court has in several instances given *Chevron* deference to interpretive regulations, including in *Chevron* itself. See *Chevron*, 467 U.S. at 844; *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398-99, 405-08 (1996) (deferring to the Labor Department's interpretive regulations construing the FLSA). Indeed, the Court has also given *Chevron* deference to a number of considerably less formal agency pronouncements. See *Christensen* v. *Harris County*, 529 U.S. 576, 589-90 (2000) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases).

2. An additional reason that the Secretary's interpretation of the Portal-to-Portal Act is entitled to a high degree of deference – which was argued below, but ignored by the court of appeals, see Labor Br. I, *supra*, at 7 n.5 – is that the regulations it promulgated in 1947 at 29 C.F.R. Part 790 (including

the principal regulation at issue here, § 790.6) were ratified by Congress when it amended the FLSA in 1949. This Court so held in *Steiner*, explaining that Congress was well informed of and endorsed the agency's interpretation:

> In 1949, Section 3(o) was added to the Act. * * * The congressional understanding of the scope of Section 4 is further marked by the fact that the Congress also enacted Section 16(c) at the same time, after hearing from the Administrator his outstanding interpretation of the coverage of certain preparatory activities closely related to the principal activity and indispensable to its performance.

350 U.S. at 254-55. Section 16(c), in turn, stated:

> Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

Id. at 255 n.8 (citing 63 Stat. 920). Because the 1949 amendments were in no way inconsistent with the regulations at issue in this case, this provision should – as *Steiner* suggests – be understood as express congressional ratification of the Administrator's (now Secretary's) interpretation.

Even without such an express congressional acknowledgment, this Court has repeatedly held that when Congress amends a statute but does nothing to change the prevailing agency interpretation, it is understood to have acquiesced. See, *e.g.*, *Boeing Co.* v. *United States*, 537 U.S. 437, 457

(2003); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). In this case, Congress's *six-decade* acceptance of the agency's "continuous workday" rule is extremely strong evidence that the rule reflects exactly what Congress intended.

3. Most egregious of all, the court of appeals utterly ignored the views of the Department of Labor even when interpreting the Department's *own regulations*. As discussed above, the court interpreted 29 C.F.R. 790.7(g) and 790.8 to support its holding in the face of the Secretary's extensive explanation in its *amicus* briefs that those provisions do not support the result the court reached and, in any event, are simply inoperative with respect to activities that occur during the "workday" as defined by the operative regulation, § 790.6. The court said nothing about this point.

In addition, the court simply disagreed with the Secretary's reading of the "workday" rule itself, but neither applied *any* standard of deference nor explained how its own construction of the "workday" rule was more consistent with the language of either the regulation or the statute itself. See Pet. App. 9a ("The Secretary urges an expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies that integral and indispensable test itself starts the workday, regardless of context."). Contrary to the court's characterization, the Secretary's interpretation (which indeed accounts for "context" – for example, whether the activity takes place at the workplace or at home) is hardly an "expansion" of the "ordinary" workday rule. Instead, it is embodied in the language of § 790.6 itself, as promulgated in 1947. See, *e.g.*, 29 C.F.R. 790.6(b) (explaining that waiting time may mark the commencement of the workday); *id.* § 790.6(a) (workday runs from the "first principal activity" to the "last principal activity"). It should be noted that the proposition the court of appeals imputed to the Secretary is hardly a radical one. Because the "integral and indispensable" test defines what the employee's "principal activities"

include, see *Steiner*, 350 U.S. at 256 (activities are compensable if they "are an integral and indispensable *part of* the principal activities"), it should be obvious that activities satisfying that test do, pursuant to the plain language of the regulation and the statute itself, start the workday.

An agency's interpretation of its own regulations is entitled to great deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))). Contrary to the court of appeals' suggestion, Pet. App. 10a, this standard applies even if – as in *Auer* – that interpretation comes in the form of an *amicus* brief. 519 U.S. at 462. The Secretary's interpretation of her agency's regulations clearly satisfies the *Auer* standard: it is completely consistent with, and if anything compelled by, the regulatory language.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case and in No. 03-1238. *IBP, Inc.* v. *Alvarez*, and consolidate the two cases.

Respectfully submitted,

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July 8, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 02-1679, 02-1739

Abdela Tum, et al., Plaintiffs, Appellants,

v.

BARBER FOODS, INC., D/B/A BARBER FOODS,
DEFENDANT, APPELLEE.

Heard: Jan. 10, 2003.
Filed: March 10, 2004.

Appeal from the United States District Court for the District of Maine

Before BOUDIN, Chief Judge, TORRUELLA and LYNCH, Circuit Judges.

OPINION

TORRUELLA, Circuit Judge.

Plaintiffs-appellants are a group of hourly wage employees ("Employees") who brought suit against their employer, Barber Foods, for alleged violations of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b). Employees sought compensation for alleged unrecorded and uncompensated work performed by them for Barber Foods.

The district court granted partial summary judgment for the defendant. A trial was held on the issue of whether the time spent donning and doffing required clothing constituted "work" and whether such time was *de minimis*. The jury found for the defendant. Employees appeal from the grant of

summary judgment, and from the district court's decision and they challenge two of the district court's jury instructions. Barber Foods cross-appeals, arguing that the district court erred in ruling that the donning and doffing of required clothing and equipment is an integral part of the Employees' work for Barber Foods and is not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activity.

After initial review by the panel, we affirmed. *Tum v. Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003). Plaintiffs filed a petition for rehearing, after which we received an amicus brief from the Secretary of Labor ("the Secretary").[4] Having considered the arguments, we now grant rehearing but affirm.

I. BACKGROUND

Located in Portland, Maine, Barber Foods is a secondary processor of poultry-based products. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. Barber Foods has two shifts, each with six production lines, consisting of three "specialty" lines and three "pack-out" lines. The product is assembled on the specialty lines, and then, after passing through large spiral freezers, the product is pouched, packed, and palletized on the pack-out lines.

The production lines are staffed primarily by rotating associates, employees who generally rotate to different positions on the lines every two hours. In addition to rotating associates, Barber Foods employs set-up operators whose primary duty is to ensure that various machines on the lines are operating properly, meatroom associates who work where the raw product is blended with ingredients, shipping and receiv-

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[4] In addition, the Secretary has filed two letters pursuant to Fed. R. App. P. 28(j).

ing associates, maintenance employees, and sanitation employees.

All associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized timekeeping system from time clocks located at the entrances to the production floor.

A. Equipment

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coats, hairnets, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and doffed before punching out.

Before they punch in, set-up operators are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats and back belts and are required to carry lock-out/tag-out equipment, which they put in their lab coat pocket. Any other items they choose to wear may be donned after punching in.

Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, back belts, aprons, and vinyl gloves. Many also choose to wear sleeve covers. All items must be on before punch in, except the apron, gloves, and sleeve covers, which can be donned after punching in and doffed before punching out.

Shipping and receiving associates are required to wear steel-toed boots, hard hats, and back belts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must also don and doff lab coats, hairnets, and earplugs in order to enter the production floor to punch in and out.

Employees obtain lab coats and cotton glove liners from the hallway between the entranceway and the equipment

cage. The lab coats are on hanger racks, and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor.

Bump hats, back belts, safety glasses, steel-toed boots, and reusable earplugs are dispensed once and then replaced as needed. Items retained by associates may be stored in their locker or taken home. Lab coats and gloves are laundered and reused; on their way out of the plant, associates drop these items in laundry bins located at several points along the hallway from the production floor exits to the plant exits. Vinyl gloves, sleeve covers, and aprons are disposed of in trash bins located on the production floor and along the hallways from the production floor exits to the plant exits.

Employees may have to wait to obtain and dispense with clothing and equipment. At busier times, there may be lines at the coat racks, glove liner bins, and cage window. There may also be lines at the time clocks.

B. Time Keeping

Barber Foods uses a computerized time-keeping system. The system downloads clock punches into the payroll software. Time clocks are located at the entrances and exits to the production floor and at various other locations in the facility. Each employee has a swipe card with a bar code, which she swipes through the time clock. Rotating associates, set-up operators, and meatroom employees generally punch in at a clock in the area where they will be working and punch out on the clocks located next to the two primary exits. Maintenance employees punch in on a time clock in the maintenance room. Shipping-and-receiving employees punch in and out on the plant office clock located by the shipping-and-receiving office. Sanitation associates punch in on the cafeteria clock and punch out at the plant office clock.

Employees get paid from the moment they punch in. In an attempt to stagger check-in times, Barber Foods allows

Employees twelve minutes of "swing time," meaning that Employees can punch in up to six minutes early and get paid for that additional time or punch in up to six minutes late and not be charged with an attendance violation.

C. History of Dispute

Seven current employees and thirty-seven former employees brought suit in district court claiming that Barber Foods violated the FLSA by forcing its hourly employees to work "off the clock" by not paying Employees for the time it takes to obtain, don, and doff their gear. Although the district court granted summary judgment for the defendants as to most counts, the court denied summary judgment as to the claim involving the donning and doffing of required clothing and equipment. The court found that the donning and doffing of clothing and equipment required by Barber Foods or by government regulation is an integral part of Plaintiffs' employment. This finding removed the donning and doffing of required gear from the Portal-to-Portal Act and its exclusion of compensability for preliminary or postliminary activity. 29 C.F.R. § 790.8. A trial was held on the issue of whether the time spent donning and doffing required clothing was *de minimis* and thus did not constitute work under the FLSA.

The jury found that the combined donning and doffing times are 1 minute for rotating associates, 2 minutes 16 seconds for set-up operators, 1 minute 53 seconds for meatroom associates, 2 minutes 8 seconds for shipping and receiving associates, and no time for maintenance and sanitation workers because they are not required to don clothing before punching in or to doff clothing after punching out. The jury found that each of these donning and doffing times is *de minimis*, making the donning and doffing time non-compensable. Employees do not challenge the jury's findings.

Employees appeal the following findings in the partial summary judgment decision: (1) that the time employees must necessarily spend walking and waiting in connection

with obtaining, donning, doffing, and disposing of the sanitary and protective gear required by Barber Foods and/or federal regulation is not compensable; (2) that the time spent donning and doffing clothing, equipment, and gear which is not expressly required by Barber Foods is non-compensable.[5] In addition, Employees challenge two district court jury instructions.[6]

II. STANDARD OF REVIEW

We review summary judgment decisions de novo. *Kauch v. Dep't for Children, Youth and Their Families*, 321 F.3d 1, 3-4 (1st Cir. 2003). Construing the facts in the light most favorable to the nonmoving party, our role is to "determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

III. DISCUSSION

The FLSA requires an employer to record, credit, and compensate employees for all of the time which the employer requires or permits employees to work, 29 U.S.C. § 201, *et seq.*, commonly defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn. Coal, Iron &*

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[5] In their brief, Employees argue that the district court erred in finding that Employees failed to raise in their Complaint or in their Opposition to Summary Judgment a claim that they are entitled to compensation for Employees' activities after punching out on the time clocks. Because we find that it is at least arguable that the issue was raised below, we address it on the merits.

[6] In their Statement of Issues, Employees contend that they appeal from the district court's finding that Barber Foods is entitled to summary judgment on the issue of whether time spent by maintenance and shipping and receiving employees is *de minimis*. However, they have waived their right to appeal by failing to make an attempt at developed argumentation. *Twomey v. Delta Airlines Pilots Pension Plan*, 328 F.3d 27, 33 n.4 (1st Cir. 2003).

R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 (1944); *see also Reich v. New York City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995).

However, even when an activity is properly classified as "work," the Portal-to-Portal Act, 29 U.S.C. § 254, exempts from compensation activities which are preliminary or postliminary to an employee's principal activity or activities unless they are an "integral and indispensable part of the principal activities for which covered work[ers] are employed and not specifically excluded by section 4(a)(1) [of the Portal-to-Portal Act]." *Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984) (citation and quotations marks omitted); *Reich*, 45 F.3d at 649. In addition, some activities that may qualify as "work" and fall outside of the Portal-to-Portal Act nevertheless do not require compensation because the activities require such little time that they are adjudged de minimis. *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976).

A. Donning and Doffing of Gear

The district court found that the donning and doffing of required gear is an integral and indispensable part of Employees' principal activities. *See generally Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956) (holding that activities should be considered integral and indispensable when they are part of the principal activities for the particular job tasks); *Mitchell v. King Packing Co.*, 350 U.S. 260, 76 S. Ct. 337, 100 L. Ed. 282 (1956). We agree with the district court's conclusion as to the required gear. In the context of this case, Employees are required by Barber Foods and or government regulation to wear the gear. Therefore, these tasks are integral to the principal activity and therefore compensable. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003) (holding that donning and doffing which is both required by law and done for the benefit of employer is integral and indispensable part of the workday); *cf.* 29 C.F.R. § 1910.132(a).

As relates to the non-required gear, Employees contend that any activity which promotes safety and sanitary conditions necessarily benefits the employer. We think this takes the argument too far. The donning and doffing of non-required gear is not compensable under these facts. Not everything an employee does in her workplace is compensable under the FLSA. These optional items required are neither by the employer nor by the regulations and are worn by Employees at their own discretion.

B. Walking Time

Employees argue that the district court improperly excluded from compensable time the periods Employees walk from one area where they obtain an initial piece of clothing or equipment (required by Barber Foods and/or USDA regulations) to another area where they obtain additional items, the period they spend walking from getting their garb to the time clocks, and the period they spend walking to the area where they dispose of clothing and equipment after they punch out.

The Portal-to-Portal Act specifically addresses walking time, generally exempting from compensation "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). The Act also generally exempts from compensation activities which are preliminary or postliminary to an employee's principal activity or activities. *See* 29 U.S.C. § 254(a)(2). On their face, these provisions would appear to exempt from compensation the walking at issue here.

Employees argue that the Portal-to-Portal Act excludes only that walking time which occurs before an employee commences her principal activity or activities. See 29 U.S.C. § 254(a)(1)-(2). The Code of Federal Regulations ("Code") states that Congress intended the term "principal activities" to be broad. 29 C.F.R. § 790.8(a) (2002). However, the Code regulations state that just because the changing of clothes may in "certain situations be so directly related to

the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity[,]' [t]his does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) [Portal-to-Portal Act] refers." 29 C.F.R. § 790.7(g) n.49 (citing colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298) (internal citation omitted).

Compensability issues are determined under the FLSA and its accompanying regulations. Both parties agree that the Portal-to-Portal Act does not apply to questions of compensability during the "workday."[7] The Secretary urges an expansion of the ordinary "workday" rule in favor of a broader, automatic rule that any activity that satisfies the "integral and indispensable" test itself starts the workday, regardless of context. This extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m. – even though he is not required to punch in to work and does not punch in until 8:00 a.m. This plainly cannot be what Congress intended. The Secretary offers a fallback position that the workday starts with any donning or doffing of required gear so long as it is done on company property. But the logic of the Secretary's position does not permit such a narrowing, nor does the

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[7] The regulations state that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal[-to-Portal] Act had not been enacted. The principles for determining hours worked within the 'workday' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act . . . ." 29 C.F.R. § 790.6.

Secretary's fallback argument make sense in a world, for example, in which not all employees who perform work that is compensable under the FLSA do so at a facility owned and run by their employer.

Further, nothing in *Steiner* requires the result that the Secretary urges,[8] and the Secretary's rule threatens to undermine Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability. Not surprisingly, the Secretary's broad position has implicitly been rejected by two circuits. *See Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 n.12 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652, 2002 WL 1396949 (5th Cir. 2002); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994). *But see Alvarez*, 339 F.3d at 906-07.

The Secretary's position is one taken in litigation, in response to an invitation from this court. The Secretary has no authority to promulgate legislative rules in this area. The Secretary has promulgated interpretive regulations, which are entitled to some weight, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but those regulations appear to cut both ways on the facts of this case. In any event, the Secretary's present litigation position, in our view, pushes so far that it threatens to undermine the Portal-to-Portal Act. We affirm the determination that the employees' walking time is not compensable.

C. Waiting Time

Employees claim that Barber Foods must compensate them for all the time they spend waiting in line to receive the

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[8] *Steiner* concerned only time spent in the donning and doffing of special protective equipment and in required protective showers. *Steiner* did not purport to say that all time walking to where that equipment is stored, waiting to retrieve and return it, and then walking to the time clock is compensable.

required clothing or equipment and to punch in at the time clocks.

Whether waiting time is compensable under the FLSA depends on whether an employee is "waiting to be engaged" or "engaged to wait." *See generally Skidmore*, 323 U.S. at 136-37, 65 S. Ct. 161. Idle time may be considered work under the FLSA where it is controlled by the employer and the time spent is dominated by the need to serve the employer's needs. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133-34, 65 S. Ct. 165, 89 L. Ed. 118 (1944). The regulations elaborate on this principle by stating that an employee is engaged to wait, i.e., working, when "the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer." *See* 29 C.F.R. § 785.15 (citations omitted). The Secretary argues that the waiting time spent by the Employees is integral to their principal activities, and compensable under the FLSA.

First, Employees argue that they should be compensated for time spent waiting to punch in at the time clocks. Waiting in line to punch in at the time clock is explicitly excluded from compensable activity by 29 C.F.R. § 790.8(c).[9] There is no indication that any of the time spent waiting is controlled by the employer. Employees have adduced no evidence to counter that conclusion.

Second, we turn to the waiting time associated with donning and doffing of clothes. Even if we were to find that the employees were engaged to wait under the FLSA and its accompanying regulations, the waiting time would qualify as preliminary or postliminary activity under the Portal-to-Portal Act. "Wait time is compensable when it is part of a principal activity, but not if it is preliminary or postliminary activity." *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994). When we

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[9] "[A]ctivities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." 29 C.F.R. § 790.8.

look at 29 C.F.R. § 790.8, we find that while the Code does not explicitly address the type of waiting time at issue, the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary. By making compensable some activities that are not traditionally thought of as primary activities, such as a logger carrying heavy equipment out to the logging site and a butcher sharpening knives, the Code was compensating workers for activities that are so integral to a principal activity that they cannot be separated from that activity. However, by excluding walking with ordinary equipment and carrying light equipment, the Code indicates that a line must be drawn, otherwise an almost endless number of activities that precipitate the employees' essential tasks would be compensable. We find that a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary.

D. Barber Foods' Cross-Appeal

Although Barber Foods ultimately prevailed on all counts, it appeals the district court's finding that the donning and doffing of Employees' required clothing and equipment is an integral part of the Employees' work at Barber Foods. "As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias v. Worldcom Techs., Inc.*, 535 U.S. 682, 684, 122 S. Ct. 1780, 152 L. Ed. 2d 911 (2002) (per curiam).

If we were to do as Barber Foods asks and reverse the challenged district court finding, our action would provide no tangible relief to Barber Foods; the company has already received all requested relief. *See New York Tel. Co. v. Maltbie*, 291 U.S. 645, 54 S. Ct. 443, 78 L. Ed. 1041 (1934).

E. Jury Instructions

Employees challenge two jury instructions, which "[w]e examine . . . to determine whether they adequately explained the law or whether they tended to confuse or mislead

the jury on the controlling issues." *Federico v. Order of Saint Benedict*, 64 F.3d 1, 4 (1st Cir. 1995). We will reverse jury instructions only if the error was prejudicial in light of the entire record. *Id.* at 3. "An erroneous jury instruction necessitates a new trial only if the error could have affected the result of the jury's deliberations." *Allen v. Chance Mfg. Co.*, 873 F.2d 465, 469 (1st Cir. 1989).

The first challenged jury instruction states the following:

> I instruct you that any time spent walking between the time clock and a bin or locker is not compensable . . . It is only the time spent actually putting on or taking off the item and placing it in a bin or locker which you must determine.

After the trial judge gave the instruction, Employees' counsel objected, arguing that the jurors might believe that they are not to compensate an employee if she is walking while donning or doffing.

We find no error in this instruction. When we look at the instructions in their entirety, we find that the jurors were clearly apprised of their duty, and that the instruction would not have confused or misled the jury about the controlling issues.[10]

The second challenge is also without foundation. The challenged instruction states:

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[10] The instruction went on to clarify the jury's duty:

> In deciding how much time it takes an associate to don and doff required clothing and equipment, you are not to decide the actual time it may take any individual employee or associate to perform those activities, rather you must decide the amount of time that you think is reasonably required by a reasonably diligent associate or employee to don and doff the required clothing and equipment.

> Now, I instructed you to don an item of clothing, for legal purposes, means to obtain and put that item on. To doff an item of clothing or equipment for these purposes means to take it off and place it in a bin or locker.

Employees contend that the judge incorrectly defined donning only in terms of clothing and should have included equipment and that the jury could mistakenly conclude that taking an item out of a bin or locker is not compensable.

The trial judge's instruction contained no error. The instruction adequately illuminated the applicable law by stating that donning includes obtaining the item. Consequently, we find that the instruction did not confuse or mislead the jury.

IV. CONCLUSION

For the reasons stated above, we affirm the district court judgment.

Affirmed.

BOUDIN, Chief Judge (concurring).

The central issue in this case is whether walking and waiting time, incident to the donning and doffing of required clothes and equipment, are compensable where (according to findings in the district court) the time spent in donning and doffing is minimal but the combined walking and waiting time may be extensive. There may be no "right" answer short of the Supreme Court's reading of its own precedents, but the problem can at least be understood if the history and underlying tensions are candidly arrayed.

The original Fair Labor Standards Act made compensable time spent in "work," but it defined the concept only in the most general terms without providing the Secretary of Labor with power to make legislative-type rules defining what constituted "work." This left many problems to be

solved piecemeal by litigation. One had to do with traveling within the job site before the main activity commenced; another, with the donning of special gear. A classic example is the miner's travel and descent from the mine portal to the working face.

Against the background of the New Deal (and the war), it was not hard for the Supreme Court to conclude that subterranean travel through dark and dangerous tunnels, undertaken for the mine owner's benefit, was work.[11] Shortly thereafter, the Supreme Court extended the reasoning in the mine-worker cases to conclude that time spent by employees of a medium-sized pottery factory in walking from time clock to work bench, and in making preliminary preparations such as donning and doffing specialized clothing, was work just as much as the actual productive activity that followed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-93, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

These holdings contradicted actual pay practice within the industries and created large overhanging liabilities for employers. To the extent that workers received more than the minimum wage, the decisions also upset underlying bargains. A flood of lawsuits followed. Congress responded with the Portal-to-Portal Act to cut off these claims for the past and to provide in the future (with exceptions not here relevant) that compensation was not required for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activi-

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[11] *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 163-66, 65 S. Ct. 1063, 89 L. Ed. 1534 (1945); *Tennessee Coal, Iron. & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598-99, 64 S. Ct. 698, 88 L. Ed. 949 (1944).

> ties, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities . . . .

29 U.S.C. § 254(a) (2000).

A decade later, this new legislative balance was reset (and perhaps upset) in a small way by a new Supreme Court decision. In *Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956), the Justices held that the Portal-to-Portal Act did not cover the time spent donning and doffing of special clothing and time spent showering, in facilities required by state law, to protect workers dealing with dangerously caustic and toxic materials. And, since the Portal-to-Portal Act did not apply, the time was to be treated as compensable work under the Fair Labor Standards Act.

Steiner was an understandable reaction – after all, the dangers were extreme and unique to the job – and the decision effectively invoked a verbal formula culled from the legislative history of the Act, 350 U.S. at 256, 76 S. Ct. 330 (concluding that pre-shift and post-shift activities are compensable if they are an "integral and indispensable" part of the principal activity); but the tension with the Portal-to-Portal Act's underlying policy has been less easy to escape as *Steiner* has been extended.

One such extension by the lower courts embraced protective clothing necessitated by less extreme health or safety concerns, although the precedents are not uniform.[12] However, the more serious problem for employers arises in cases

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[12] *Compare, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003) (extending Steiner to such items as sanitary aprons) with *e.g., Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994) (holding that the donning and doffing of sanitary outergarments, although required, was not integral and indispensable); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001)(same), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002).

such as this one by attempts to extend *Steiner* further to walking and waiting incident to such donning and doffing. This course may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal.

The Secretary defends such an extension by combining *Steiner's* verbal formula – "integral and indispensable" – with another settled principle: that once the workday has begun with the first principal activity, anything else until the workday ends is compensable unless the employee is essentially on his own (e.g., lunch breaks). On this theory, a worker who picks up and puts on a required helmet at the plant entrance – an activity integral to a principal activity under *Steiner* (as extended by lower courts) – then must be compensated for everything else that happens (e.g., walking and waiting to pick up more equipment, walking to the time clock at the production floor entrance, waiting to punch in).

Yet, thus extended, the tension with the Portal-to-Portal Act becomes acute: after all, why is this complex of donning, doffing, waiting and travel within the Barber plant very different from the preliminary activities which were involved in the *Mt. Clemens* case – one of the targets of the Portal-to-Portal Act. Further, the legislative history and the Secretary's own regulations give examples of events excluded from compensable work – such as time spent waiting to punch in and time spent walking from plant gate to work bench – that appear at odds with her position in this case. *See* S. Rep. No. 80-48, at 47 (1947); 29 C.F.R. § 790.7.

The Secretary answers, in effect, that those examples assumed that no required helmet was donned at the entrance – but should this really convert everything after into compensable work when it would not otherwise be? In any event, the Secretary can cite a favorable result in the Ninth Circuit, see *Alvarez*, 339 F.3d at 906-07; but the Fifth and Tenth Cir-

cuits, addressing variants on this theme, have resisted the Secretary's result, although not for the same reasons.[13]

One further basis for resisting the Secretary derives from yet another principle from the Supreme Court, namely, that under certain circumstances time spent on a de minimis activity that is not the main activity of the worker should be disregarded. *See Mt. Clemens*, 328 U.S. at 692-93, 66 S.Ct. 1187. If the time spent donning and doffing is *de minimis*, can it also not be disregarded as starting the workday and allow courts to disregard the associated walking and waiting? Such a result is not on its face at odds with *Steiner* where the donning and doffing and showering were not claimed to be de minimis.

The Secretary replies that the *de minimis* concept has nothing to do with when the workday begins or ends but the *de minimis* concept is much fuzzier than the Secretary lets on: in the Supreme Court case that spawned it, the Court stated broadly that "compensable working time is involved" only "when an employee is required to give up a substantial measure of his time and effort." *Mt. Clemens*, 328 U.S. at 692, 66 S. Ct. 1187. So one could say that a *de minimis* activity which is non-compensable time under *Mt. Clemens* does not start of the workday, at least when preliminary to arrival "on the factory floor."

Thus, two positions are juxtaposed. One is the Secretary's mechanical combination of *Steiner* with a rigid "everything after is work" principle. The other is to treat required donning and doffing as compensable where more than *de minimis* but, where it is not, leaving both it and any associated walking and waiting time as non-compensable. Neither out-

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[13] *Anderson*, 147 F.Supp.2d at 563 n.12 (holding that "walk time" to employee's work station was not compensable), *aff'd*, 2002 WL 1396949 (5th Cir.); *Reich*, 38 F.3d at 1127 (upholding the denial of "walk and wait" time related to donning and doffing).

come is impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy.

So where does the balance of advantage lie? Admittedly, the donning, doffing, waiting and walking involved are in the employer's service: but that was equally true in the *Mt. Clemens* case and Congress made a policy decision against required compensation. And, while the Secretary's interpretive view (although non-binding) is entitled to some deference, *United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001), it is recent and offered only in litigation: no explicit regulation mandates the Secretary's outcome and the text of 29 C.F.R. § 790.7(g) n.49 points towards excluding the walking and waiting time.

On Barber's side, as already noted, the history and language of the Portal-to-Portal Act tend to favor Barber, as do two of the three circuit decisions; the question is how far *Steiner* has qualified the statute. Perhaps it is enough for a lower court that the Secretary's position is, in practical effect, a substantial step beyond *Steiner*. As *Steiner* itself tempers the Portal-to-Portal Act's main thrust, probably its extension should be left to the Supreme Court.

Finally, it appears that wages at the Barber plant were set against a background practice of treating as non-compensable the donning, doffing, walking and waiting involved in this case. Unless those wages are the federal minimum, a decision that now such time is compensable will likely be offset by wage adjustments in the future, leaving only a one-time windfall for employees. It is hard to begrudge this to workers doing difficult and disagreeable work, but the situation does bear an uncanny resemblance to that which prompted the Portal-to-Portal Act. It may be time for the Supreme Court to have another look at the problem.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
No. 00-371-P-C.
ABDELA TUM, ET AL., PLAINTIFFS
v.
BARBER FOODS, INC., DEFENDANT

Jan. 23, 2002.

Recommended Decision Granting in Part and Denying in Part Defendant's Motion For Summary Judgment

COHEN, Magistrate Judge.

The defendant, Barber Foods, Inc., moves for summary judgment on all claims asserted by the forty-one named plaintiffs[1] against it in this action brought under the Fair Labor Standards Act. I recommend that the court grant the motion in part and deny it in part.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the

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[1] The defendant has requested dismissal of sixteen of these plaintiffs as a sanction for failure to respond to the defendant's interrogatories as ordered in my Report of Final Pretrial Conference and Order (Docket No. 32) at 2. Barber Foods' Motion for Sanctions, etc. (Docket No. 37). I have recommended that this motion be granted. Recommended Decision on Defendant's Motion for Sanctions (Docket No. 40).

outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. FACTUAL BACKGROUND

The summary judgment record includes the following undisputed material facts appropriately supported in accordance with this court's Local Rule 56. The defendant is a secondary processor of poultry products at a single facility located in Portland, Maine.[2] Barber Foods' Statement of Ma-

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[2] Plaintiffs' Statement of Response to Barber Foods' Material Facts ("Plaintiffs' SMF") (Docket No. 29) provides no response to this and many other paragraphs of the defendant's statement of material facts. These paragraphs are accordingly deemed admitted, to the extent that they are supported by the citations to the summary judgment record given by the defendant. Local Rule 56(c). A cita-

terial Facts in Support of Motion for Summary Judgment ("Defendant's SMF") (Docket No. 22) ¶ 1.1; Affidavit of Peter Bickford ("Bickford Aff."), Exh. 3 to Defendant's SMF, ¶ 2. The defendant has two production shifts, each with six lines, three of which are "specialty" lines and three of which are "pack-out" lines. Defendant's SMF ¶ 1.2; Bickford Aff. ¶ 3. The product is assembled on the specialty lines. *Id.* After moving through the specialty lines and large spiral freezers, the product is pouched, packed and palletized on the pack-out lines. *Id.*

The production lines are staffed primarily by rotating associates, who generally rotate to different positions on the lines every two hours. Defendant's SMF ¶ 1.3; Bickford Aff. ¶ 4. There are 149 rotating associates on each shift. *Id.* In addition to rotating associates, each line has set up operators whose primary duties are to make sure that the various machines on the lines are operating smoothly. Defendant's SMF ¶ 1.4; Bickford Aff. ¶ 5. There are 34 set-up operators on each shift. *Id.*

The plaintiffs include seven associates currently employed by the defendant and 37 former employees. Defendant's SMF ¶ 2.1; Bickford Aff. ¶ 7. Twenty-six of the plaintiffs are or were rotating associates. Defendant's SMF ¶ 2.2 & Exh. 1 thereto. Two of the plaintiffs are employed as set-up operators; one plaintiff worked in the meat room; two plaintiffs worked in maintenance; two plaintiffs worked in shipping and receiving; eight plaintiffs worked in sanitation; and three plaintiffs work or worked in two job classifications. *Id.* The sanitation crew works on the third shift; the first two shifts are production shifts. Defendant's SMF ¶ 3.1; Bickford Aff. ¶ 9.

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tion to the defendant's statement of material facts followed by a citation to the summary judgment record will be made in this section of my recommended decision whenever I refer to such factual allegations.

Associates are expected to be on the production floor ready to work when their shift begins. Defendant's SMF ¶ 3.3; Plaintiffs' SMF ¶ 3.3. Associates are paid from the time they actually punch in. Defendant's SMF ¶ 3.3; Bickford Aff. ¶ 11. Associates are given paid breaks of 15 minutes in the first half of the shift and 10 minutes in the second half. Defendant's SMF ¶ 4.1; Bickford Aff. ¶ 12. In each break associates are given an extra paid five minutes to get to and from the production floor.[3] *Id.* Associates are also given an unpaid 30-minute meal break in the middle of each shift, along with an extra five paid minutes to get to and from the production floor. Defendant's SMF ¶ 4.2; Bickford Aff. ¶ 12.

All associates are required to wear the following sanitary and/or safety clothing or equipment before entering the production floor: lab coat, hairnet, beardnet (if applicable) and earplugs. Defendant's SMF ¶ 5.1; Affidavit of William Whittier ("Whittier Aff.") (Exh. 4 to Defendant's SMF) ¶ 2. Since October 15, 2001 all associates on the production floor have also been required to wear safety glasses. *Id.* Associates may also wear one or more of the following: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump

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[3] The plaintiffs' statement of material facts includes a paragraph 4.1 which reads, in its entirety: "Barber Foods had not submitted credible evidence that its employees are paid for an extra 5 minutes of travel time per break." Plaintiffs' SMF ¶ 4.1. A statement to that effect in the defendant's statement of material facts is supported by citations to paragraph 12 of the Bickford affidavit and certain pages of the deposition of William Whittier, which are attached to the statement of material facts as Exhibit 11. Both of these citations support the allegation in the statement of material facts. If the plaintiffs' response is intended as an objection, it fails for lack of any identified basis. Questions of credibility are reserved for the trier of fact, but the party contesting credibility must provide the court with something beyond a conclusory assertion that the cited evidence is not credible before the court can determine whether such a situation exists. At a minimum, some evidence disputing the sworn evidence at issue must be cited.

hats, back belts, steel-toed boots, rain pants, steel mesh gloves, and lockout-tagout equipment. Defendant's SMF ¶ 5.2; Plaintiffs' SMF ¶ 5.2. The parties dispute the question whether the defendant requires associates to wear any of these additional items. Nets, earplugs, gloves, sleeve covers and aprons are dispensed by employees at the supply cage. *Id.* ¶ 5.4. Vinyl gloves, sleeve covers and aprons are also available from tubs on the production floor. Defendant's SMF ¶ 5.5; Whittier Aff. ¶ 6. Most associates who wear these items obtain them from the tubs. *Id.* All associates are offered the use of a locker in which they may store reusable clothing or equipment. Defendant's SMF ¶ 5.8; Whittier Aff. ¶ 9.

Rotating associates are required to wear lab coats, hair and beard nets, earplugs and safety glasses.[4] Defendant's SMF ¶ 6.1; Plaintiffs' SMF ¶ 6.1. Set-up operators are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats and back belts and carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.2; Plaintiffs' SMF ¶ 6.2. Set-up operators are also required at times to wear sleeves, rubber gloves or palletizing gloves. Plaintiffs' SMF ¶ 6.2; Deposition of Tadeusz Olszynski ("Olszynski Dep.") (Exh. 9 to Plaintiffs' SMF) at 5, 9-10.

Employees working in the meatroom are required to wear lab coats, hairnets, beardnets, earplugs, safety glasses, vinyl gloves, aprons, sleeve covers, steel-toed boots and back belts and to carry lock-out/tag-out equipment.[5] Defendant's

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[4] The plaintiffs contend that "some rotating associates are required to wear gloves" as well, Plaintiffs' SMF ¶ 6.1, but the record citation given for this assertion does not support it, and the defendant has appropriately objected to the statement on this basis. Barber Foods' Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 33) ¶ 6.1.

[5] The plaintiffs contend that these employees are also required to wear bump hats. Plaintiffs' SMF ¶ 6.3; Deposition of Ernest Levesque ("Levesque Dep.") (Exh. 4 to Plaintiffs' SMF) at 8.

SMF ¶ 6.3; Plaintiffs' SMF ¶ 6.3. Shipping and receiving employees are required to wear safety glasses, steel-toed boots and a bump hat or hard hat. *Id.* ¶ 6.4. They are also required to wear back belts. Plaintiffs' SMF ¶ 6.4; Deposition of Kevin Snow ("Snow Dep.") (Exh. 1 to Plaintiffs' SMF) at 24. These employees must pass through the production floor in order to punch in and punch out and must put on the gear required for production employees in order to do so. Plaintiffs' SMF ¶ 6.4; Snow Dep. at 9-10. Maintenance employees must wear safety glasses and steel-toed boots and carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.5; Deposition of Jeffrey Shaw ("Shaw Dep.") (Exh. 12 to Defendant's SMF) at 12-13. Sanitation employees are required to wear lab coats, hairnets and beard nets, earplugs, safety glasses, gloves, rain pants, steel-toed boots and bump caps and to carry lock-out/tag-out equipment, hose nozzles and tool clips. Defendant's SMF ¶ 6.6; Affidavit of Cletis R. Bragg, Jr. (Exh. 10 to Defendant's SMF) ¶ 2.

Lab coats and cotton glove liners are laundered and reused. Defendant's SMF ¶ 7.1; Affidavit of Thomas Page ("Page Aff.") (Exh. 5 to Defendant's SMF) ¶ 2. Laundry bins are located at several points along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant. *Id.* Vinyl gloves, sleeve covers and aprons are disposable. Defendant's SMF ¶ 7.2; Page Aff. ¶ 3. Trash bins are located on the production floor and along the hallway from the production floor exits to the plant exits. *Id.* These items may be removed and deposited in the trash bins before punching out if the associate chooses. *Id.* Bump hats, back belts, safety glasses, steel-toed boots and reusable earplugs are retained by the associates and may be stored in a locker or taken home at their option. Defendant's SMF ¶ 7.3; Plaintiffs' SMF ¶ 7.3.

The defendant uses a computerized time-keeping system. *Id.* ¶ 8.1. Each associate has a swipe card with a bar code. *Id.* The system downloads clock punches into the payroll software. *Id.* Time clocks are located at the entrances

and exits to the production floor and at various other locations in the facility. *Id.* ¶ 8.2. Employees swipe their individual cards through the machine and the machine registers the punch. Plaintiffs' SMF ¶ 8.2; Deposition of Barber Foods, Inc. ("Page Dep.") (Exh. 11 to Plaintiffs' SMF) at 11. Rotating associates, set-up operators and meatroom associates generally punch in at a clock in the area where they will be working and punch out on the "out" clocks which are located next to the two primary exits. Defendant's SMF ¶ 8.3; Affidavit of Catherine Smith ("Smith Aff.") (Exh. 6 to Defendant's SMF) ¶ 3; Affidavit of Tyrone Ive ("Ive Aff.") (Exh. 7 to Defendant's SMF) ¶ 3; Affidavit of Douglas Goodwin ("Goodwin Aff.") (Exh. 8 to Defendant's SMF) ¶ 3; Deposition of Thomas Page (Exh. 13 to Defendant's SMF) at 99. Maintenance associates punch in on a time clock in the maintenance room. Defendant's SMF ¶ 8.3; Shaw Dep. at 25. Shipping and receiving associates punch in and out on the plant office clock located by the shipping and receiving office. Defendant's SMF ¶ 8.3; Affidavit of Timothy Scanlin ("Scanlin Aff.") (Exh. 9 to Defendant's SMF) ¶ 3. Sanitation associates punch in on the cafeteria clock and punch out at the plant office clock. Defendant's SMF ¶ 8.3; Bragg Aff. ¶¶ 3, 5.

During busier times, there may be lines at the coat racks and glove liner bins, the cage window or the time clocks. Defendant's SMF ¶ 10.3; Smith Aff. ¶ 7. During these times an associate may have to wait to obtain a coat and glove liners, to obtain items from the cage or to punch in. *Id.* An employee can spend between two and eight minutes in line at the supply cage. Plaintiffs' SMF ¶ 10.3; Deposition of Abdela Tum ("Tum Dep.") (Exh. 5 to Plaintiffs' SMF) at 30-32.

Associates on the production floor must be wearing lab coats, hairnets and earplugs before they can enter the production floor and punch in. Defendant's SMF ¶ 10.5; Smith Aff. ¶ 3. Gloves, aprons and sleeve covers are optional. *Id.* Most associates wear gloves; aprons and sleeve covers are worn by most associates on the specialty lines and infre-

quently by associates on the pack-out lines. *Id.* Gloves, aprons and sleeve covers are usually donned after punching in. Defendant's SMF ¶ 10.6; Smith Aff. ¶ 4.

Set-up operators don the required equipment and then punch in on the production floor. Defendant's SMF ¶ 10.8; Ive Aff. ¶ 3. Prior to punching out, they return to the cage any items they had checked out earlier. Defendant's SMF ¶ 10.9; Plaintiffs' SMF ¶ 10.9. After punching out, they deposit their coats, gloves and hairnets in the appropriate bins and may store other equipment in their lockers or take it home. *Id.* at ¶ 10.10.

Meatroom associates don the required equipment and punch in at the meatroom clock. Defendant's SMF ¶ 10.11; Goodwin Aff. ¶ 3. Gloves, aprons and sleeve covers may be deposited in the trash before punching out. Defendant's SMF ¶ 10.12; Goodwin Aff. ¶ 4. At the end of the shift, meatroom associates wash their boots if necessary. Defendant's SMF ¶ 10.12; Plaintiffs' SMF ¶ 10.12. Lab coats, gloves, hairnets, sleeve covers and aprons are deposited in laundry or trash bins; remaining items are stored in lockers or taken home. Defendant's SMF ¶ 10.12; Goodwin Aff. ¶ 4.

Shipping and receiving associates go to the shipping office and don coats, hairnets and earplugs before entering the production floor to punch in at the plant office clock. Defendant's SMF ¶ 10.13; Scanlin Aff. ¶ 3. After punching in they return to the shipping office to doff this equipment and go to their assigned area, unless they are going directly from the time clock to work on the production floor or in the freezer. *Id.* At the end of their shift, these associates must again don coats, hairnets and earplugs before entering the production floor to punch out at the plant office clock. Defendant's SMF ¶ 10.14; Scanlin Aff. ¶ 4. After punching out, they leave their coats in the shipping office and drop the hairnet and earplugs in the trash. *Id.*

Maintenance associates have their own time clock in

the maintenance department. Defendant's SMF ¶ 10.15; Shaw Dep. at 25. Any required clothing or equipment is put on after punching in. Defendant's SMF ¶ 10.15; Shaw Dep. at 28. At the end of the shift, these associates doff all equipment before punching out. Defendant's SMF ¶ 10.16; Plaintiffs' SMF ¶ 10.16.

Sanitation workers punch in on the cafeteria clock. Defendant's SMF ¶ 10.17; Bragg Aff. ¶ 3. There is a nightly meeting in the cafeteria, after which the associates go upstairs to work. *Id.* At the end of the shift, these associates wash their rain pants and tools while on the clock and then punch out at the plant office clock. Defendant's SMF ¶ 10.19; Bragg Aff. ¶ 5. They then deposit their coats, glove liners, hairnets and gloves in the appropriate bins and reusable items of equipment in their lockers. *Id.*

Associates are free to leave the premises during their unpaid break. Defendant's SMF ¶ 11.1; Bickford Aff. ¶ 19. Lab coats must be removed if an associate leaves the premises or uses the bathroom. Defendant's SMF ¶ 11.2; Whittier Aff. ¶ 10. Gloves, aprons and sleeve covers also must be removed when an associate uses the bathroom. *Id.*

The defendant has a medical office that is staffed by a nurse from 6:00 a.m. to 6:30 p.m. Monday through Friday and by a physician from 2:00 p.m. to 5:00 p.m. Tuesdays and Thursdays. Defendant's SMF ¶ 12.1; Bickford Aff. ¶ 20. Appointments with this office are initially made by an associate's crew lead. Defendant's SMF ¶ 12.2; Bickford Aff. ¶ 21. If an associate needs to visit the office on other than an emergency basis, the crew lead checks the available appointment times on the computer and generally tries to schedule the associate for the next available slot. *Id.* Appointments cannot be scheduled during an associate's meal break on the second and third shifts because the medical office is not staffed when those meal breaks occur. Defendant's SMF ¶ 12.4; Bickford Aff. ¶ 23.

Plaintiff Toan Dang left the employ of the defendant

on April 2, 1998; plaintiff Mohammad Habibzai left the employ of the defendant on May 7, 1998; and plaintiff Lee LaCroix left the employ of the defendant on July 22, 1998. Defendant's SMF ¶ 13.3; Bickford Aff. ¶ 26.

III. DISCUSSION

The complaint alleges that the defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to keep accurate time records resulting in the denial of regular and overtime compensation and by permitting or requiring employees to perform integral and indispensable activities for its benefit before and after the regular paid work shift and during unpaid breaks. Complaint (Docket No. 1) at 19-20. The defendant seeks summary judgment on these claims. Due to the nature of the evidence presented in the summary judgment record, different groups of employees must be considered separately with regard to each of these claims.

A. Statute of Limitations

The defendant contends that the claims of ten plaintiffs who left its employ more than two years before the complaint was filed or their written consents as opt-in plaintiffs were filed are barred by the applicable statute of limitations. Barber Foods' Memorandum in Support of Motion for Summary Judgment ("Motion"), attached to Barber Foods' Motion for Summary Judgment (Docket No. 21) at 21-23. The applicable statute provides that actions based on claims like those raised by these plaintiffs "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). An action is considered to have been commenced on the day the complaint was filed for named plaintiffs and on the date when a written consent to become a party plaintiff is filed for all plaintiffs not named in the original

complaint. 29 U.S.C. § 256(a). The plaintiffs respond that there is sufficient evidence to support a finding that the defendant's alleged violations of the FLSA were willful, making the three-year period applicable. Plaintiffs' Memorandum in Opposition of [sic] Barber Food's Motion for Summary Judgment ("Opposition") (Docket No. 30) at 15-16.

Even if the three-year period were applicable, it is undisputed that the written consents of plaintiffs Mohammad Habibzai and Toan Dang were filed in this court on June 18, 2001, Docket No. 16, more than three years after they each left the employ of the defendant. Defendant's SMF ¶ 13.3. Accordingly, summary judgment should be entered against them. *See Bolduc v. National Semiconductor Corp.*, 35 F. Supp. 2d 106, 116 (D.Me. 1998).

"[A]n employer acts willfully for the purposes of the FLSA's statute of limitations if it knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) (citation and internal quotation marks omitted). Here, the plaintiffs rely, Opposition at 15-16, on the defendant's assertion that Peter Bickford, its "human resources business partner," who is primarily responsible for monitoring the defendant's compliance with the FLSA, attended annual seminars on labor and employment issues and subscribed to numerous periodicals which deal with current issues under the FLSA. Defendant's SMF ¶ 13.2. Asserting in conclusory fashion that the defendant's violation of the FLSA as alleged is "clear," the plaintiffs then draw the conclusion that the defendant must have known through Bickford that its conduct violated the FLSA or at least recklessly disregarded the possibility that its conduct violated the FLSA. Opposition at 15-16. However, as will become apparent later in this recommended decision, even if the defendant's conduct occurred as alleged by the plaintiffs, to the extent that those allegations are supported in the summary judgment record, it is far from clear that the conduct at issue violated the FLSA. The First Circuit noted in *Baystate*

that the applicable standard for a willful violation of the FLSA was established by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which rejected a negligence standard for liability. 163 F.3d at 679, 681. Where, as here, "legitimate disagreement" may exist with respect to application of the FLSA to a specific set of facts, a court should be reluctant to find a knowing violation of the FLSA. *Id.* at 680. An employer does not act willfully even if it acts unreasonably in determining whether it is in compliance with the FLSA. *Id.* at 681.

The plaintiffs argue that willfulness must always be determined by the factfinder. Opposition at 15. However, the First Circuit has held that, where no genuine issue of material fact is raised on the summary judgment record, summary judgment on this issue is appropriate. *Lopez v. Corporación Azucarera de Puerto Rico*, 938 F.2d 1510, 1515-16 (1st Cir. 1991). I conclude, given the closeness of the substantive questions raised by the plaintiffs under the FLSA and the lack of dispositive authority, as discussed more thoroughly below, that there is no genuine issue of material fact as to the defendant's knowledge that its alleged actions violated the FLSA or as to any reckless disregard by the defendant of the possibility that its alleged actions violated the FLSA. Accordingly, the claims of the following plaintiffs are barred by the two-year statute of limitations and the defendant is entitled to summary judgment against them: Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis and Kyra Pardue. Docket No. 16 & Exh. 1 to Defendant's SMF.

B. Pre-Shift and Post-Shift Activities

The plaintiffs seek compensation for time spent (i) walking from the plant entrance to the places where they obtain the clothing and equipment they wear while working and then to the time clocks where they punch in, Complaint ¶ 20; Opposition at 8; (ii) waiting in line to obtain clothing and equipment or to punch in, Opposition at 8, 10; (iii) putting on

clothing and equipment, Complaint ¶ 20; and (iv) removing clothing and equipment and placing it in bins or lockers, Complaint ¶ 23, Opposition at 8.[6] The defendant relies in significant part on the Portal-to-Portal Act, 29 U.S.C. § 254, in support of its motion for summary judgment on these claims. That statute provides, in pertinent part:

> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . . -
>
> (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). The term "principal activity or activities" "embraces all activities which are an integral and indispensable part of the principal activities." *Steiner v. Mitchell,* 350 U.S. 247, 252-53 (1956) (citation and internal quo-

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[6] The defendant contends that the plaintiffs also seek compensation for "the time it takes . . . to walk from the clocks where they punch out to their lockers, if they use them, and then to the plant exits." Motion at 4. I find no such allegation in the complaint or in the plaintiffs' opposition to the motion for summary judgment.

> tation marks omitted). "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed . . . ." *Id.* at 256.

Walking from the plant entrance to a workstation or actual place of performance of the employee's principal work activity is not compensable. 29 C.F.R. § 790.7(e) & (f); *Pressley v. Sanderson Farms, Inc.*, 143 Lab. Cas. ¶ 34,262, 2001 WL 850017 (S.D. Tex. Apr. 23, 2001), at *2-3. The plaintiffs here attempt to combine this time with time spent waiting to punch in or to obtain necessary clothing or equipment, but time spent waiting in line to punch in or out is also not compensable under the FLSA. 29 C.F.R. §§ 790.7(g); 790.8(c). With respect to the time spent waiting to pick up clothing or equipment, the plaintiffs rely on *Amos v. United States*, 13 Cl. Ct. 442 (1987), Opposition at 6-7, but in that case the employer conceded that the time spent procuring and returning keys, a radio and a body alarm was compensable under the FLSA, 13 Cl. Ct. at 448. The Court of Claims held that "once [the plaintiffs] had the keys and other equipment items in their possession, [they] in effect had reported for duty," *id.* at 449, and found the time spent walking to duty stations thereafter to be compensable, *id.* at 450. Here, the plaintiffs claim compensation for the time spent before obtaining their clothing and equipment. Based on the statutory and regulatory language quoted above, as well as the case law, that time is not spent in activity that could reasonably be construed to be an integral part of employees' work activities any more than walking to the cage from which hairnets and earplugs are dispensed is to be so considered.

The defendant is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where

clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

With respect to claims based on the donning and doffing of equipment, the available case law varies in its application of section 254. Before considering that case law, however, it is necessary to address the defendant's argument that maintenance employees are paid for any time spent donning and doffing equipment and that sanitation employees are paid for time spent donning equipment. Motion at 10. The plaintiffs do not respond to this argument, but the court must nonetheless consider it on the merits in the context of summary judgment. *Lopez*, 938 F.2d at 1517.

The defendant's contention that maintenance employees are paid for time spent doffing clothing and equipment, Defendant's SMF ¶ 10.16, is supported by the citation and not denied by the plaintiffs' response, Plaintiffs' SMF ¶ 10.16 (maintenance employees take off equipment and clothing "before punching out").[7] Accordingly, the defendant is entitled to summary judgment on any claim by maintenance employees for compensation for time spent doffing clothing and equipment or engaged in other activities post-shift. With respect to the donning of clothing and equipment by maintenance employees, the plaintiffs challenge the defendant's assertion that "[a]ny required clothing or equipment is put on after punching in," Defendant's SMF ¶ 10.15, with the statement that "[m]aintenance employees are required to obtain

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[7] The corresponding paragraph of the plaintiffs' statement of material facts is not supported by the citation given. As stated, it cannot reasonably be interpreted as anything other than an agreement with the defendant's statement. The fact that it is not supported by the citation given also means that the corresponding paragraph in the defendant's statement of material facts must be deemed admitted so long as it is supported by the record citation given, which is the case here. *See* Shaw Dep. at 30-31.

much of their required gear before clocking in," Plaintiffs' SMF ¶ 10.15. While the plaintiffs offer only the interrogatory responses of a single employee to support their assertion that all maintenance employees are required to obtain "much of" their required gear before punching in and that it "typically" takes 10-15 minutes to walk from the entrance of the building to a locker,[8] get equipment and don clothing and equipment, *id.*, and while, strictly speaking, "obtaining" equipment is not the same thing as putting it on, so that the plaintiffs' statement is not directly responsive to the defendant's factual assertion, this evidence is sufficient, although barely, to create a disputed issue of material fact on the question whether pre-shift donning activity is paid for by the defendant. Summary judgment for the defendant is not appropriate on this issue.

With respect to sanitation employees, the defendant asserts that "[a]ssociates are paid to get ready," and that they "may obtain and don their clothing and equipment before going to the cafeteria to punch in if they wish, but this would be at their option, it is not required." Defendant's SMF ¶ 10.18. The plaintiffs' response, again supported by the interrogatory responses of a single plaintiff, represents that "[s]anitation workers must obtain" their clothing and equipment and don it prior to punching in. Plaintiffs' SMF ¶ 10.18. Again, giving the plaintiffs the benefit of the inferences available to the party opposing summary judgment, the fact that two supervisors told a single sanitation employee that he "would be reprimanded" if he "did not have all [his] protective clothing, gear, and equipment on when it was time to punch in," Plaintiff Albert R. Howard, Jr.'s Answers to Defendant Barber Foods' Interrogatories ("Howard Int.") (Exh. 22 to Plaintiffs' SMF), Answer to Interrogatory No. 5, is sufficient to raise a dispute concerning an issue of material fact on this claim. The defendant accordingly is not entitled to summary judgment on the pre-shift "donning" claim for compensation by

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[8] I have already determined that such time is not compensable under the FLSA.

sanitation employees.

1. Activities as "Work."

The remaining donning and doffing claims may be discussed together. The defendant contends that these activities are not "work" within the meaning of the FLSA and that the time spent in these activities is in any event *de minimis*, taking it outside the requirements of the FLSA as a matter of law. Motion at 10-15. The plaintiffs challenge both of these arguments. Opposition at 2-14. Changing clothes "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities, 29 C.F.R. § 790.7(g), and thus not compensable under the Portal-to-Portal Act, but "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions," *id.* § 790.7(h), and thus compensable. "The term 'principal activities' includes all activities which are an integral part of a principal activity." 29 C.F.R § 790.8(b).

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.

Id. § 790.8(c). *See also id.* n. 65 ("Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work.") The First Circuit has noted that courts may determine whether disputed activities are preliminary or postliminary for purposes of the FLSA. *Ballou v. General Elec. Co.*, 433 F.2d 109, 111 (1st Cir. 1970).

I conclude that the donning and doffing of clothing

and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) ("physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business"). This is admittedly a close question. Several courts have held otherwise in cases that appear close on their facts to the claims presented here.

In *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), the Tenth Circuit upheld a trial court's FLSA decision, finding that "the placement of a pair of safety glasses, a pair of earplugs and a hardhat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration," so that these activities did not meet the "physical or mental exertion" prong of the *Muscoda* test, and accordingly could not be considered "work" under the FLSA. *Id.* at 1125-26. However, the court also upheld the trial court's finding that workers who required special safety equipment including "some combination of" aprons, belly guards, mesh sleeves or arm guards, wrist wraps, gloves, rubber boots, belts and shin guards should be compensated under the FLSA for the time involved in donning, doffing and cleaning these items. *Id.* at 1124-25. Among the reasons given for the distinction were that the safety gear used by the latter group of employees was uniquely required by the dangers of the production jobs being performed and that the donning, doffing and cleaning activities required physical exertion, time and "a modicum of concentration." *Id.* at 1125, 1126. Here, the facts suggest a scenario that is somewhere between the two groups described in *IBP*. The time required for donning and doffing is hotly disputed. The parties offer little in the way of evidence about the necessity of any of the clothing or equipment at issue for safety of the employees,

although the plaintiffs offer some general statements, not specifically tied to their jobs or the clothing and equipment at issue, about the potential hazards of work in the plant.[9] Plaintiffs' SMF ¶¶ 5.2(a)-5.2(c). I do not find *IBP* persuasive for purposes of the present motion.

In *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), the court held, after trial, that employees were not entitled to compensation for the donning and doffing of sanitary and safety equipment under the FLSA because the employees wore clean outer garments to protect their street clothes from becoming soiled and changing into and out of such garments was not integral and indispensable to their principal jobs. *Id.* at 563. The clothing at issue was earplugs, hairnets, cotton "frocks," rubber aprons, rubber gloves and cotton gloves. *Id.* at 562. The court found that "the donning and doffing of these items does not involve 'physical or mental exertion'" due to the fact that the donning and doffing "takes seconds to accomplish and requires very little concentration," and therefore did not qualify as work under the FLSA. *Id.* at 561. Here, the defendant has submitted evidence that the activities at issue may take from 1 to 5 minutes pre-shift, Defendant's SMF ¶¶ 10.4, 10.8, 10.11, 10.20, and from 1 to 4 minutes post-shift, *id.* ¶¶ 10.7, 10.10, 10.12, 10.14, 10.20. The plaintiffs suggest that the pre-shift activities take between 8 and 36 minutes, Plaintiffs' SMF ¶¶

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[9] The defendant failed to provide a response to these and certain other paragraphs of the plaintiffs' statement of material facts that presented new facts in addition to those submitted initially by the defendant after I ordered it to do so if it did not wish those paragraphs to be deemed admitted. Order (Docket No. 36) at 2. Accordingly, they have been deemed admitted to the extent that they are appropriately supported by citations to the summary judgment record.

10.3, 10.3(b), 10.4, 10.6, 10.8, 10.11, 10.19-10.20,[10] and the post-shift activities take from 7 to 25 minutes, *id.* ¶¶ 10.7(a), 10.9, 10.10, 10.12, 10.14, 10.16, 10.19-10.20. While it appears that most of the clothing and equipment involved would require very little concentration to don or doff, it is far from clear on this record that this could be accomplished in seconds. Again, I do not find *Anderson* to be persuasive.

Finally, in *Pressley,* the trial court found in the context of summary judgment, citing *IBP,* that a claim under the FLSA for compensation for time spent donning, doffing and cleaning a smock, apron, cotton or rubber gloves, rubber sleeves, a hairnet and earplugs "fails as a matter of law." 2001 WL 850017 at *2-3. The opinion provides no analysis in support of this conclusion.

The First Circuit has stated that

> [t]he activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee. The crucial question is not whether the work was voluntary but rather whether the employee was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.

Secretary of Labor v. E.R. Field, Inc., 495 F.2d 749, 751 (1st Cir. 1974) (citation and internal punctuation omitted). The First Circuit attached particular significance to the fact that the Portal-to-Portal Act does not cover any work of consequence performed for an employer, citing 29 C.F.R. § 790.8(a). *Id.* On this record, I cannot conclude that the plain-

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[10] These figures apparently include time spent walking from plant entrances to time clocks or to sites where clothing and equipment could be obtained and time waiting in line to punch in or to obtain equipment, both of which are not compensable. It is not possible in most cases to determine from the plaintiffs' submissions how much of the total stated times is accounted for by those activities.

tiffs were not performing services for the benefit of the defendant when they donned and doffed the required equipment.

I do find persuasive the reasoning of the court in *Lee v. Am-Pro Protective Agency, Inc.*, 860 F. Supp. 325, 326-27 (E.D. Va. 1994), supporting its holding on a motion for summary judgment that the employer defendant was not entitled to summary judgment on a claim under the FLSA for compensation for time spent changing into clothing required by the employer for its security guard employees. *See also Dunlop v. City Elec., Inc.*, 527 F.2d 394, 397-401 (5th Cir. 1976) (test is whether activities in question performed as part of regular work of employees in ordinary course of business and are necessary to business and performed primarily for benefit of employer). The donning and doffing at issue here are not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities.

2. Whether the activities are "*de minimis*."

Activity which may be considered work under the FLSA, not excluded from compensability by the Portal-to-Portal Act, may nonetheless not require compensation under the FLSA if it involves only a few minutes of work beyond the scheduled working hours. *Anderson*, 328 U.S. at 692. "It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Id.* Courts weight four facts to determine whether an activity is *de minimis* as a matter of law for purposes of an FLSA claim:

> (1) the amount of daily time spent on the additional work; (2) the administrative difficulty in recording the time; (3) the size of the aggregate claim; and (4) the regularity of the work.

Anderson, 147 F. Supp. 2d at 564; *Pressley*, 2001 WL 850017 at *3. "Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." *Lindow v. United States*, 738 F.2d 1057, 1062

(9th Cir. 1984) (citing cases).

Here, the amount of daily time spent on the activities at issue is very much in dispute. The defendant expresses concern about the administrative difficulty that would be involved in recording this time, Motion at 15, but employees are required to engage in these activities every day, and the scope of the activities does not change from day to day. Thus, there should be little or no variation in the time spent on these activities by each employee from day to day. *See also* 29 C.F.R. § 785.47 ("An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable working period of time he is regularly required to spend on duties assigned to him."). The defendant does not suggest that it could not practically establish rules allowing each employee to punch in before donning and to punch out only after doffing the clothing and equipment at issue, while excluding time spent socializing, walking or waiting, Motion at 15. The lack of such information does not mean that the plaintiffs are entitled to recover but merely precludes the entry of summary judgment in the defendant's favor on the basis of this record. I have already mentioned the regularity of the work. Given the number of employees on each of the defendant's two shifts, the size of the aggregate claim could be quite large. These factors also counsel against the entry of summary judgment on the basis of the *de minimis* rule.

C. Meal Break

The plaintiffs contend that the defendant provides less than the 30-minute meal break required by law and requires them to use the bathroom during the unpaid meal break, so that the available time is further reduced by the need to remove and re-don the required clothing and equipment. Complaint ¶ 21. The defendant makes the same arguments with respect to this claim; that these activities are not work within the meaning of the FLSA and that the time involved is in any event *de minimis*. Motion at 16.

The defendant first contends that this claim cannot be raised by sanitation associates, "who are paid from punch in to punch out with no deduction for an unpaid meal break," or to maintenance or shipping and receiving employees. *Id.* The plaintiffs do not respond to this argument but their response to the paragraph in the defendant's statement of material facts cited by the defendant in support of this argument does dispute the necessary underlying factual assertion with respect to maintenance employees. The plaintiffs again generalize from the interrogatory response of a single sanitation employee, Plaintiffs' SMF ¶ 4.4, who details his activities during a 30-minute break in response to an interrogatory seeking a description of "all work performed by you . . . for which you claim you were entitled to be paid but were not paid for [sic]," Howard Int. at [4], Interrogatory No. 12 & Answer thereto. With the benefit of a reasonable inference, this evidence raises a disputed issue of material fact that precludes summary judgment on this aspect of the plaintiffs' claims. The fact that a review of this employee's payroll records demonstrates that he was paid from punch in to punch out with no deduction for any unpaid lunch break, Barber Foods' Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 33) ¶¶ 4.4, 8.4 [sic]; Affidavit of Peter Bickford (Exh. 1 thereto) ¶ 3; Payroll record (Exh. 3 thereto), provides impeachment evidence but does not permit the court to disregard the employee's sworn statement in the context of a motion for summary judgment.

The outcome is different for maintenance and shipping and receiving associates. The defendant's statement of material facts, unchallenged by the plaintiffs in this regard, establishes that employees must remove lab coats, gloves, aprons and sleeve covers in order to use the bathroom. Defendant's SMF ¶ 11.2, Whittier Aff. ¶ 10; Plaintiffs' SMF ¶¶ 11.1-11.2. The defendant's statement that maintenance employees are required to wear only safety glasses, steel-toed boots and lock-out/tag-out equipment is not challenged by the plaintiffs. Defendant's SMF ¶ 6.5, Shaw Dep. at 12-13.

Maintenance employees are required to wear a lab coat when they enter the production floor, *id.*, but even assuming that such an employee's lunch break would occur while he or she was on the production floor, doffing the coat on the way off the floor can hardly consume more than a few seconds, a *de minimis* period of time. The defendant's statement of material facts also establishes that shipping and receiving associates are required to wear only safety glasses, steel-toed boots and a bump hat or hard hat. Defendant's SMF ¶ 6.4, Scanlin Aff. ¶ 2. The plaintiffs' SMF adds a back belt to this list, Plaintiffs' SMF ¶ 6.4, but that is not an item that needs to be doffed in order to use the bathroom. These employees are also required to wear a lab coat when on the production floor, Defendant's SMF ¶ 6.4, Plaintiffs' SMF ¶ 6.4, but the same considerations discussed with respect to maintenance employees apply here. The defendant is entitled to summary judgment on any lunch break/bathroom use claims raised by maintenance and shipping and receiving employees.

An employer need not be compensated for bona fide meal periods, during which the employee "must be completely relieved from duty for the purposes of eating regular meals" and which must ordinarily consist of 30 minutes or more. 29 C.F.R. § 785.19(a). The evidence concerning the question whether the defendant provides those of its employees whom it does not pay for a 30-minute period in each work day, on a regular basis, with at least 30 minutes of time during which they are "completely relieved from duty" cannot be determined on the basis of the summary judgment record. The defendant contends that employees are given an extra five minutes of paid time to get to and from the production line in connection with the lunch break, Defendant's SMF ¶ 4.2, which the plaintiffs do not dispute, and that the 30-minute meal break "starts when the last associate leaves the line," Defendant's Reply SMF ¶ 11.1-11.2. These facts, it contends, suffice to establish as a matter of law that no employee receives less than 30 minutes of lunch break time. Motion at 17.

However, the plaintiffs have provided the testimony of two employees to the effect that they did not in fact receive 30-minute lunch breaks. Plaintiffs' SMF ¶¶ 11.1-11.2, 11.3; Deposition of Ernest Levesque (Exh. 4 to Plaintiffs' SMF) at 39-41; Deposition of Celso Florendo (Exh. 2 to Plaintiffs' SMF) at 48. Coupled with their assertions that the time required to doff and don required clothing and equipment in order to eat is more than *de minimis,* Plaintiffs' SMF ¶ 11.3; Howard Int. at [4] (Answer to Interrogatory No. 12); Plaintiff Allison Carey's Answers to Defendant Barber Foods' Interrogatories (Exh. 21 to Plaintiffs' SMF) at [4] (Answer to Interrogatory No. 12); Plaintiff Kenneth LaMarche's Answers to Defendant Barber Foods' Interrogatories (Exh. 24 to Plaintiffs' SMF) at [4]-[5] (Answer to Interrogatory No. 15), a fact-based assertion which for the reasons discussed previously cannot be determined on the basis of the summary judgment record, the plaintiffs have raised a disputed issue of material fact on this claim.

With respect to the plaintiffs entitled to raise a claim concerning bathroom breaks, the record supports the defendant's position. The defendant notes that "there is no evidence that associates cannot use the bathroom if necessary during the shift," and points out that all employees are given a 15-minute paid break in the first half of the shift and a 10-minute paid break in the second half, in addition to the lunch break. Motion at 16-17. They are also given an additional five paid minutes in connection with each break to get to and from the production floor. Defendant's SMF ¶ 4.1; Bickford Aff. ¶ 12. The defendant also argues that removing a lab coat, gloves, apron and sleeve covers in order to use the bathroom is not work within the scope of the FLSA and that the time involved is in any event *de minimis.* Motion at 17-19. The plaintiffs respond that bathroom break activities "take substantially more time and effort than alleged by" the defendant, Opposition at 10, and that the defendant "has admitted that it suggests to employees that they use their lunch break or other break to use the restroom," *id.* at 11. They assert in conclu-

sory fashion that this "effectively . . . force[s] employees to perform compensable work during unpaid break time." *Id.* This minimalist argument is insufficient. Even if the evidence could reasonably be interpreted to allow an inference that a "suggestion" by management about when employees should use the bathroom has the practical force of a requirement, an inference that cannot be reasonably drawn on the basis of the existing summary judgment record,[11] the plaintiffs have made no attempt to show that using the bathroom as recommended during one of the paid breaks is not practically possible for employees. Under these circumstances, the defendant is entitled to summary judgment on the plaintiffs' claims based on use of the bathrooms, because the plaintiffs have not offered sufficient evidence to allow a reasonable jury to find in their favor on this claim.

D. Medical Visits

The defendant contends that the evidence is insufficient to allow the plaintiffs to proceed with their claim that they are sometimes ordered to use their unpaid break time to visit the plant nurse's office. Motion at 19-21. The applicable regulation provides:

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[11] In connection with their argument on their final claim, discussed below, the plaintiffs assert that a recommendation from management that employees visit the plant nurse's office during lunch break "surely carries great weight for an at will employee and is tantamount to a command. *See* Barber Foods Associate Handbook." Opposition at 14. This assertion is not supported by a reference to, or indeed an entry in, the plaintiffs' statement of material facts and therefore will not be considered by the court. In addition, the lack of a pinpoint citation to a page or pages in the document, as well as any indication where in the record the document may be found, makes the citation too general to be of any use to the court. It is not the court's role to search through the summary judgment record for material that might support a party's factual assertions. *Pew v. Scopino,* 161 F.R.D. 1, 1 (D.Me. 1995).

> Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

29 C.F.R. § 785.43.

The defendant first argues out that this claim cannot be raised by sanitation workers, because they only work on the third shift, when the plant medical office is not staffed, nor by any second-shift workers, because the medical office is not staffed when the second-shift meal period is taken. Motion at 20. The plaintiffs do not respond to the argument concerning sanitation workers. The medical office at the defendant's plant is staffed from 6:00 a.m. to 6:30 p.m. Monday through Friday. Defendant's SMF ¶ 12.1; Bickford Aff. ¶ 20. The defendant's first shift runs from 6:30 a.m. to 3:00 p.m., its second shift runs from 3:45 p.m. to 12:15 a.m., and its third shift runs from 11:30 p.m. to 6:30 a.m. Defendant's SMF ¶ 3.1; Bickford Aff. ¶ 9. All sanitation workers work on the third shift. Defendant's SMF ¶ 3.2; Bickford Aff. ¶ 10. Obviously, no sanitation worker could receive medical attention on the premises during his or her normal working hours. The plaintiffs make no claim that any sanitation workers received medical attention at any other location at the direction of the defendant during the third shift. Accordingly, the defendant is entitled to summary judgment on any claim concerning medical attention raised by sanitation workers.

With respect to second-shift workers, the plaintiffs do not dispute the defendant's assertion that the medical office is closed during the meal break. Instead, they argue that the applicable regulation is violated because second-shift employees "typically must visit the nurse before their shift begins and before they clock in." Plaintiffs' SMF ¶¶ 12.2-12.5. The plaintiffs offer the testimony of two individuals, each of whom was scheduled once to visit the nurse before the start of the second shift, in support of this assertion. Tum Dep. at 52-

53; Olszynski Dep. at 47-48. Even if the plaintiffs were given the benefit of an inference that these individuals' experience was "typical," however, the scheduling of medical visits before an employee's shift begins at 3:45 p.m. does not, for all that appears in the summary judgment record, require that employee to wait for or receive that attention during his or her normal working hours. Therefore, the evidence would not allow a factfinder to conclude that the regulation was violated. The defendant is entitled to summary judgment on this claim insofar as it is raised by second-shift workers.

With respect to first-shift workers, the plaintiffs provide evidence only that two supervisors "recommended" that an employee visit the medical office during lunch break. Plaintiffs' SMF ¶ 12.2-12.5; Levesque Dep. at 42. For the reasons discussed earlier, *see* footnote 10, the plaintiffs cannot convert such a recommendation into evidence that any employee actually was required to do so. Even plaintiff Levesque testified that he was not required to do so. Levesque Dep. at 42. The defendant points out, correctly, that there is no evidence in the summary judgment record that any of the plaintiffs was required to visit the medical office during lunch break and was not paid for that time. Barber Foods' Reply Memorandum (Docket No. 34) at 5-6; Defendant's Reply SMF ¶ 12.2-12.5. The only other evidence from a first-shift employee cited by the plaintiffs, Plaintiffs' SMF ¶¶ 12.2-12.5, and therefore the only evidence that the court may consider in connection with this motion for summary judgment, is the deposition testimony of plaintiff Tum, who testified that since he had been working on the first shift, he had not been required to see the nurse during his lunch breaks. Tum Dep. at 53.

Tum also testified that management did require "some people" to see the nurse during the lunch break or made appointments for them to see the nurse at that time. *Id.* If the plaintiffs meant to invoke this testimony in their statement of material facts, it still does not support the necessary additional element of such a claim that the employees involved were not

paid for the time so spent. The defendant's evidence that employees who have medical appointments scheduled during their meal breaks "because this was the only available slot" are paid for the time involved and allowed to take the entire meal break before or after the appointment, Defendant's SMF ¶ 12.4, Bickford Aff. ¶ 23, is not challenged by any evidence identified by the plaintiffs in their statement of material facts. The summary judgment record would not allow a reasonable factfinder to conclude that the defendant violated the applicable regulation with respect to its first-shift employees.[12] Accordingly, the defendant is entitled to summary judgment on all first-shift medical-visit claims.

IV. CONCLUSION

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be GRANTED as to the following claims: (i) all claims asserted by plaintiffs Mohammad Habibzai, Toan Dang, Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis and Kyra Pardue; and (ii) all claims asserted by the remaining defendants based on (a) time spent walking from the plant entrances to an employee's work station, locker, time clock or site where clothing or equipment is to be obtained; (b) time spent waiting to punch in or out or for clothing or equipment to be dispensed; (c) use of bathrooms; and (d) medical visits. I recommend that the motion be DENIED as to the remaining claims set forth in the parties' submissions in connection with the motion.

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[12] In addition, a basic requirement for a "collective action" under 29 U.S.C. § 216(b), such as this action, *see* Order for Notice Under 29 U.S.C. § 216(b) (Docket No. 14), which allows one or more employees to bring an action "for and in behalf of himself or themselves and other employees similarly situated," would seem to be that at least one of the employees involved, whether as a self-designated representative or as an opt-in plaintiff, have suffered the injury that is the subject of the claim.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, *et al.*	)
Plaintiffs	)
	)
v.	)
Civil No. 00371-P-C	)
	)
BARBER FOODS, INC.,	)
Defendant	)
	)

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The United States Magistrate Judge having filed with the Court on January 11, 2002, with copies to counsel, his Recommended Decision on Defendant's Motion for Summary Judgment (Docket No. 41); and Defendant having filed its objection thereto on February 4, 2002, (Docket No. 44), to which objection Plaintiffs filed their response on February 14, 2002 (Docket No. 47); and Plaintiffs having filed their objection to the Magistrate Judge's Recommended Decision on February 4, 2002 (Docket No. 45), to which objection Defendant filed its response on February 14, 2002 (Docket No. 46); and this Court having reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; and this Court having made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision, and concurring with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision, it is **ORDERED** as follows:

(1) Plaintiffs' objection is hereby **DENIED**;

(2) Defendants' objection is hereby **DENIED**;

(3) The Recommended Decision of the Magistrate Judge is hereby **AFFIRMED**;

(4) Defendant's Motion for Summary Judgment is hereby **GRANTED** as to the following claims:

(i) all claims asserted by Plaintiffs Mohammed Habibzai, Toan Dang, Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis, and Kyra Pardue; and

(ii) all claims asserted by the remaining Defendants based on (a) time spent walking from the plant entrances to an employee's work station, locker, time clock, or site where clothing or equipment is to be obtained; (b) time spent waiting to punch in or out or for clothing or equipment to be dispensed; (c) use of bathrooms; and (d) medical visits.

(5) The motion is hereby **DENIED** as to the remaining claims set forth in the parties' submissions in connection with the motion.

GENE CARTER
District Judge

Dated at Portland, Maind this 20th day of February, 2002.

RELEVANT STATUTORY PROVISION

29 U.S.C. 254(a) provides as follows:

§ 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable. Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act [enacted May 14, 1947]—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or ac tivities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or sub sequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an em ployer's vehicle for travel by an employee and active ties performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or

estalishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.